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APPENDIX A

SEATTLE SCHOOL DISTRICT NO. 1 OF KING COUNTY, WASHINGTON, a Municipal Corporation, et al., Plaintiffs,

and

American Civil Liberties Union et al.,
Intervenor Plaintiffs,

v.

The STATE of Washington et al.,
Defendants

and

Citizens for Voluntary Integration
Committee (Ci.V.I.C.) et al.,
Intervenor Defendants.

No. C78-753V.

United States District Court,
W. D. Washington.

June 15, 1979.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

VOORHEES, District Judge.

Based upon the complete record in this case, including testimony and evidence introduced at the trial in this matter, the Court makes the following:

FINDINGS OF FACT

1. *Parties*

1.1 Plaintiff Seattle School District No. 1 of King County, Washington (sometimes called "Seattle" or the "District" herein) is under Revised Code of Washington

Title 28A ("RCW 28A") a lawfully organized and functioning municipal corporation. It is charged by law of the State of Washington "to provide without distinction or preference on account of race, color, caste or sex * * * a general and uniform system of public schools" (An.Const. art. IX, §§ 1 and 2) for the educational instruction of the approximately 54,000 common school students, of whom 37.3 percent are racial minorities according to current federal reporting categories, in kindergarten and grades 1 through 12. There are approximately 112 schools in Seattle, which is the largest public school district in the State of Washington, the boundaries of which are substantially coterminous with the boundaries of the City of Seattle, King County, Washington.

1.2 Plaintiff Tacoma School District No. 10 of Pierce County, Washington (sometimes "Tacoma" herein) is under RCW 28A a lawfully organized and functioning municipal corporation. It is charged by law of the State of Washington "to provide without distinction or preference on account of race, color, caste or sex * * * a general and uniform system of public schools" for the educational instruction of the approximately 29,000 common school students, of whom 20 percent are racial minorities according to current federal reporting categories, in kindergarten and grades 1 through 12. There are approximately 57 schools in Tacoma, which includes the City of Tacoma, the incorporated towns of Fircrest and Ruston and the unincorporated areas of Hunt's Prairie, Dash Point and Brown's Point which are substantially coterminous with the boundaries of the City of Tacoma, Pierce County, Washington.

1.3 Plaintiff Pasco School District No. 1 of Franklin County, Washington (sometimes "Pasco" herein) is under RCW 28A a lawfully organized and functioning municipal corporation. It is charged by law of the State of Washington "to provide without distinction or preference on account of race, color, caste or sex * * * a general and uniform system of public schools" for the educational instruction of the approximately 5,300 common school students, of whom 26.5 percent are racial minorities according to current

federal reporting categories, in kindergarten and grades 1 through 12. There are approximately ten schools in the Pasco School District, which includes the City of Pasco and the contiguous unincorporated areas of south Franklin County, Washington.

1.4 Plaintiff Board of Directors of Seattle School District No. 1 (sometimes the "Board" herein) is composed of seven publicly elected members. The Board commits itself and adopts policy by a majority vote of its members. It is the statutorily constituted legislative, adjudicative, and administrative governing body of the District and is responsible for operating and setting administrative and educational policy for the District. All plaintiff Board members have taken as a prior condition of assuming their public duties the following oath of office:

> I do solemnly swear that I will faithfully and impartially perform the duties of Director, Seattle School District No. 1 as prescribed by law and to the best of my ability, and that I will support and maintain the Constitution of the State of Washington and the United States. So help me God.

1.5 As indicated in the caption to this document plaintiffs Sutton, Alexander, Bleakney, Olson, Hollingsworth and Hittman are members of the Seattle School Board whose identified children are attending school in Seattle. They have been declared guardians ad litem for those children by Order of this Court.

1.6 Plaintiffs Vassar, Annie Jones, Wasserman, Davis, Andrews, Tangalin, Santos, Marr, Joe and Mona Jones, Charles, and Taupule are parents of children, identified in the caption to this document, who are attending school in Seattle. They have been declared guardians ad litem for those children by the Order of this Court.

1.7 The individual plaintiff students represent the diverse racial and ethnic mix of students in Seattle.

1.8 Intervenor plaintiff American Civil Liberties Union of Washington (ACLU of Washington) is the Washington State affiliate of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization

dedicated to the promotion and protection of the civil rights and liberties of all persons.

1.9 Intervenor plaintiff American Friends Service Committee (AFSC) is an international social change organization related to the Society of Friends (Quakers). Among the AFSC's basic goals is the protection and promotion of the civil rights and liberties of all persons.

1.10 Intervenor plaintiff Church Council of Greater Seattle is an ecumenical organization established in 1969 to provide a structure within which 22 church denominations (local congregations, and church-related entities, Protestant and Catholic, in the Metropolitan Seattle Area) can work cooperatively.

1.11 Intervenor plaintiff Loren Miller Bar Association, a Washington nonprofit corporation, is comprised of approximately 45 lawyers admitted to practice in one or more states of the United States. It is an affiliate of the National Bar Association, comprised of lawyers of minority races. The Loren Miller Bar Association was organized statewide in the mid-1960's, having as a primary purpose the provision of legal assistance to minority persons in cases involving deprivation of civil rights and liberties.

1.12 Intervenor plaintiff Seattle Branch, National Association for the Advancement of Colored People (Seattle Branch, NAACP) is the local affiliate of the NAACP. Throughout its 60 year existence, the NAACP has had as a primary purpose the achievement of quality integrated education for all persons regardless of race.

1.13 Intervenor plaintiff Seattle Chapter of the American Jewish Committee is the local branch of a national organization founded in 1906 with stated purposes of resisting and eliminating racism, bigotry and anti-Semitism.

1.14 Intervenor Plaintiff Seattle Urban League is a local affiliate of the National Urban League, a nationwide, nonprofit, nonpartisan organization dedicated to equal opportunity and racial justice.

1.15 Each of the intervenor plaintiff organizations described in paragraphs 1.8 through 1.14 above has members or constituents whose minor children attend the

Seattle schools, and each intervenor plaintiff sues on its own behalf and on behalf of such members and their children.

1.16 The individual intervenor plaintiffs named in the caption to this document are taxpayers residing within the boundaries of Seattle and are parents of minor children, named in the caption to this document, who attend public schools in Seattle. These individual plaintiffs are black, white, Chicano, and Asian-American citizens of the United States who bring this action each on their own behalf and on behalf of their minor children, for whom they have been appointed guardians ad litem by Order of this Court.

1.17 The rights of the members or constituents of the above intervenor plaintiff organizations and other persons to equal protection of the laws is germane to the organizational purposes of the intervenor plaintiff organizations.

1.18 Additional intervening plaintiff East Pasco Neighborhood Council is a nonprofit corporation organized under the laws of the State of Washington in 1971. The East Pasco Neighborhood Council is primarily composed of minority individuals and families. The general membership resides in an area known as "East Pasco." East Pasco is an area which has been physically segregated from the business area and majority population of Pasco by the tracks of the Northern Pacific Railroad. These railroad tracks were constructed in approximately 1943.

1.19 The individual additional intervening plaintiffs named in the caption are all residents of East Pasco. Each of these individual intervening plaintiffs is a racial minority in Pasco, and each is a parent or guardian ad litem, as identified in the caption, for a student of the Pasco School District No. 1 of Franklin County, Washington.

1.20 Additional intervenor plaintiff the United States of America has statutory authority under Section 902 of Title IX of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-2, to participate in actions, such as the present matter, involving alleged denial of equal protection of the laws. The Attorney General has certified that this case is of general public importance.

1.21 Defendant the State of Washington is one of the fifty United States of America.

1.22 Defendant Dixy Lee Ray is Governor of the State of Washington.

1.23 Defendants John Bagnariol and Duane L. Berentson are the principal officers of the Washington State House of Representatives. Defendant John A. Cherberg is the principal officer of the Washington State Senate.

1.24 Defendant Slade Gorton is Attorney General of the State of Washington.

1.25 Defendant Frank B. Brouillet is Washington State Superintendent of Public Instruction.

1.26 Defendants H. Eugene Hall, Levy S. Johnston, Jack L. Reid, Edward Diamond, Mark E. Hoehne, Roger H. Lincoln, Walter H. Lewis, James M. Spalding, Ollie Mae Wilson, Orville Barnes, Grant L. Anderson, Eileen B. Kalles, Philip B. Swain, and Robert B. Stookey are all of the members of the Washington State Board of Education.

1.27 Defendant Norman K. Maleng, Prosecuting Attorney of King County, Washington has been dismissed from these proceedings.

1.28 Intervenor defendant Citizens for Voluntary Integration Committee (CiVIC) is a Washington nonprofit corporation which was a drafter, sponsor, organizer, and campaigner for Initiative Measure No. 350, the subject matter of this lawsuit.

1.29 CiVIC was formed on or about December 28, 1977 with the stated purposes of opposing mandatory school assignments based on racial or ethnic identification, proposing affirmative programs of voluntary integration, and promoting quality education on an equal basis for all. A copy of the CiVIC Articles of Incorporation was filed with the Secretary of State of the State of Washington on or about January 16, 1978.

1.30 Intervenor defendants Peter and Sandra King, Dahley, Bates, Liddell and George and Sally King are parents of the children, identified in the caption, who attend school in Seattle.

2. *Tender to State; Rejection*

2.1 On November 28, 1978, original plaintiff individ-

uals and taxpayers formally tendered this action to the Attorney General of the State of Washington demanding that he promptly initiate and competently prosecute proper legal action to have Initiative 350 declared unconstitutional. The Attorney General declined plaintiffs' request to institute this action in his letter of December 19, 1978.

3. *General Facts and Historical Context; Segregation of Plaintiff School Districts; Failure of "Voluntary" Desegregation*

3.1 An educational system in which minority students are relatively segregated from white students provides an unequal and poorer education than a system in which the schools are racially balanced.

3.2 The three plaintiff school districts have had, and in some instances continue to have, racially imbalanced schools. The term "racial imbalance" in a school is used to mean a disproprotionately high minority enrollment in a particular school in relation to districtwide minority student population. The term "segregation" is used to mean, where indicated, racial separation in housing patterns.

3.3 In each of the plaintiff school districts, there are residential areas in which minority races are predominant.

3.4 The preponderance of minority families live in the central and the southeast quarter areas of the City of Seattle. Those Seattle schools which are most crowded are located in those areas of the city where the preponderance of minority families live.

3.5 Residential segregation in Seattle and the proportion of minorities in the school system are such that elimination of racial imbalance in the public schools cannot be accomplished through "voluntary" desegregation strategies consistent with Initiative 350.

3.6 The segregation of housing by races in Seattle cannot be expected to change sufficiently to permit the racial balancing of public schools to be accomplished within the reasonably foreseeable future unless some students are assigned to schools other than their nearest or next nearest schools.

3.7 It is difficult to gauge the degree to which "racial bias" influences opinions about "busing." Nevertheless, racial bias or racial motivation is a factor in the opposition to the "busing" of students to attain racial balance.

3.8 Plaintiff school districts have for some time attempted to reduce or eliminate the racial imbalance existing in their schools. But for these efforts which direct or permit many students to attend schools other than their nearest or next nearest schools, there would be even greater racial imbalance in the schools of plaintiff school districts.

3.9 The closure of schools is not a practicable tool for racial balancing because there is such great and emotional opposition to the closure of schools.

3.10 The measures taken by the Seattle and Tacoma School District plaintiffs to balance their schools racially have met with both public opposition and public support. In the Seattle School District, the opposition has included several lawsuits and an unsuccessful recall election directed at school board members who in 1971 voted to implement a middle school desgregation program which included mandatory student assignments to non-"neighborhood" schools. The mandatory assignment feature of the middle school program was the most controversial part of the program and was the primary reason for the recall attempts.

3.11 On October 19, 1978, defendant State Board of Education adopted a policy statement, applicable to the State's common schools, condemning racial segregation in schools and urging the elimination of segregation from the State's public schools. On that same day, the State Board adopted a definition of racial isolation which was the same as that adopted by the Seattle School Board by its Resolution 1977-8.

3.12 At the commencement of the 1978-79 school year, there were 769,040 students enrolled in the public schools of this State. At time of trial approximately 300,000 students were being transported by bus to public schools in the State. Ninety-five percent of those students were being transported for reasons unrelated to school district

attempts to reduce or eliminate racial imbalance in the schools.

4. *Historical Background as to Pasco*

4.1 In 1943 the Energy and Research Development Administration, at that time known as the Manhattan Project, selected the Hanford site for the production of plutonium for the atomic bomb. The Pasco population in 1943 was predominantly white. Substantial numbers of blacks began to arrive in the Tri Cities to work on the Manhattan Project at Hanford. At that time Richland was a federal government-owned town and under rigid federal housing regulations which excluded blacks. Blacks were unable to find housing in Richland, Kennewick or certain areas of Pasco. The availability of homes for blacks was greater in east Pasco. Blacks and other minorities began to move into the east Pasco area, east of the railroad tracks.

4.2 With the phasing out of the Manhattan Project and the scaling down of the activities of the U.S. Atomic Energy Commission, many individuals stayed and sought whatever work was available. Black population in east Pasco continued to increase, and there began a trend of migration of whites to the west Pasco area. New schools in the Pasco School District ("Pasco") followed these population shifts. One original school, Whittier Elementary School, was left in east Pasco. The residential segregation in Pasco resulted in a racially imbalanced public school system.

4.3 In the spring of 1965 the Pasco School Board elected to close predominantly black Whittier Elementary School. The Board voluntarily adopted a systematic plan for equalizing pupil distribution by race throughout the Pasco School System. A pupil transportation scheme was developed to facilitate this, and attendance boundaries were changed. Only minority children have been bused in order to implement the Pasco plan. No white students have been transported to achieve racial balance.

4.4 East Pasco is between 92 and 97 percent minority.

4.5 The Pasco District has seven elementary schools.

Three would be predominantly white and three predominantly minority if students attended the school nearest to their homes. Current minority percentages in the elementary schools are as follows:

Mark Twain	15.7%
Longfellow	50.0%
Livingston	15.3%
Gray	38.9%
Robert Frost	31.6%
Emerson	44.8%
Markham	12.9%

5. *Historical Background as to Tacoma*

5.1 For over a decade the Tacoma School District has allowed students to attend schools other than those geographically closest to their homes for the purpose of preserving an appropriate racial balance in its schools. Through a program of both mandatory actions (school closures and racially controlled enrollment at magnet schools) and voluntary alternatives for students and parents (optional enrollment, busing, and counseling), the Tacoma School District has been able to lessen the racial imbalance in its schools. The Tacoma School District's definition of a racially imbalanced school is one that has a combined minority enrollment of 50 percent or more or a single minority of 40 percent or more. All student enrollment in the Tacoma School District is subject to the district's policy of maintaining a racially balanced school district.

5.2 In the early 1960's, Tacoma School District personnel and community leaders realized that housing patterns and other factors had led to relatively high concentrations of racial minorities at certain of the district's schools.

5.3 In July 1966, the Tacoma School Board adopted a voluntary optional enrollment policy for students attending McCarver Junior High School, a central area facility experiencing minority enrollment exceeding 50 percent of the school population. Students who resided in the attendance area for McCarver Junior High School were given the option to attend other junior high schools in the

district. In addition, students at other junior high schools were given an opportunity to attend McCarver Junior High School, provided that such attendance would reduce the racial imbalance existing at McCarver. The Tacoma School District provided special bus transportation for students participating in this optional enrollment program.

5.4 In June 1967 the voluntary optional enrollment program was expanded to include these central area elementary schools: McCarver, Stanley, Central and Bryant Elementary Schools. Students residing in the attendance areas for those schools were given the option to attend any elementary school in the Tacoma School District. In addition, optional enrollment opportunities were extended to students attending elementary schools outside the central area to attend the central area elementary schools if transfer into the schools would tend to reduce racial imbalance.

5.5 In October 1967 minority enrollment at McCarver Elementary, Stanley, and McCarver Junior High Schools was in excess of 50 percent of the total student population of those schools.

5.6 In April 1968 the Tacoma School Board adopted major changes designed to ease the perceived racial imbalance in Tacoma schools. The changes included:

a. Closure of McCarver Junior High School as a junior high school, and transfer of all junior high school students attending McCarver to junior high schools throughout the district;

b. Establishment of an exemplary elementary school ("magnet school") at the McCarver Junior High School facility, with admission open to students throughout the district by voluntary application only, and with student attendance controlled by the district to preserve an appropriate racial balance;

c. Closure of Central Elementary School;

d. Transfer of all sixth graders at Stanley Elementary School to other elementary schools throughout the district;

e. Reaffirmation of the district's position that no high school in the Tacoma School District would be allowed to become racially imbalanced.

5.7 Following this school district action, McCarver Elementary School went from an 87 percent black population in 1967 to a 53 percent black population in 1969.

5.8 In May 1970 the Tacoma School Board adopted policies specifically committing the district to the reduction of racial imbalance to levels within the State Board of Education guidelines, and establishing a technologically advanced elementary school ("magnet school") at Stanley Elementary, with an admission program similar to that existing at McCarver Elementary.

5.9 By September 1971 the elimination of board-defined racial imbalance at McCarver Elementary School has been completed.

5.10 By September 1972 no school in the Tacoma School District had minority enrollment in excess of 50 percent of total student enrollment except Hawthorne, which was closed as a school building in 1973-74.

5.11 In November 1972 the Tacoma School Board adopted a limited voluntary optional enrollment program for high school students, allowing high school students to attend, with certain qualifications, the schools of their choice.

5.12 In February 1974 the Tacoma School Board extended the voluntary optional enrollment program, with certain qualifications, to all grade levels throughout the district.

5.13 The Tacoma School District currently operates educationally enhanced (magnet school) programs at McCarver Elementary School and Stanley Elementary School. Both are located in the Tacoma central area. Those elementary schools are now operated as districtwide elementary schools with attendance selections made solely by application. Students are accepted in those schools in light of the number of student vacancies at the schools and in light of the racial balance at those schools.

5.14 As a part of the magnet school programs at McCarver and Stanley Elementary Schools, attendance at those schools is controlled by the Tacoma School District to maintain a racial balance within the district, state and federal guidelines. At the initiation of the Tacoma School

District magnet school program in 1968-1970 some students living in the geographic attendance areas immediately surrounding McCarver and Stanley were denied enrollment at those schools because their attendance would adversely affect the racial balance. Thus, students, and particularly black students, whose attendance would have disrupted the desired level of racial balance at Stanley and McCarver were assigned to other elementary schools throughout the Tacoma School District. At present, changes in housing patterns, optional enrollment, busing and counseling have permitted all students residing in McCarver Elementary School geographic attendance area to attend that school, if they wish, without creating a racially imbalanced school. However, at present, 70 students from the Stanley attendance area are denied admission to Stanley Elementary School.

5.15 The optional enrollment program operated by the Tacoma School District allows students to attend any school within the Tacoma School District, except the Stanley and McCarver Elementary Schools, whose attendance is controlled by the district through voluntary applications. To assist the students' and parents' decisions concerning optional enrollment, the district has operated an extensive summer counseling program to counsel parents and students concerning the availability of educational opportunities at schools other than those nearest the homes of the students.

5.16 Public transportation is an element of both the magnet school and the optional enrollment programs. Transportation is funded by the district, though transportation services are actually delivered by the Tacoma Transit System. Currently, approximately 1,394 students bus in and out of the Tacoma central area as a part of the magnet school program. Approximately 1,200 additional students annually participate in the optional enrollment program and many of those students use bus transportation to travel between their homes and schools. Of the approximately 1,394 students busing in and out of the Tacoma central area, approximately 444 are elementary school children who reside in geographic areas in which

either McCarver or Stanley is the nearest or next nearest elementary school. For most of these students, McCarver or Stanley is also their next-nearest school.

6. *Historical Background as to Seattle*

6.1 For many years the Seattle School District ("Seattle") has taken steps to end racial imbalance of its schools. These steps hve often been associated with significant public controversy. In addition to the present litigation, Seattle has been a party to several lawsuits and administrative proceedings relating to desegregation. Some are:

Campbell et al. v. Seattle School District No. 1, Cause No. 9171 before the United States District Court for the Western District of Washington (suit to require "an acceptable plan to achieve meaningful racial balance in the public schools throughout Seattle * * *" (Complaint, page 6) filed on or about August 28, 1970 and dismissed October 12, 1972);

State ex rel. Citizens Against Mandatory Bussing v. Brooks, ("CAMB I"), 80 Wash.2d 121, 492 P.2d 536 (1972) (concerning the sufficiency of a petition to recall School Board members who voted for a controversial multi-racial middle school and mandatory busing program);

Citizens Against Mandatory Bussing v. Palmason, ("CAMB II"), 80 Wash.2d 445, 495 P.2d 657, 50 A.L.R.3d 1076 (1972) (a companion case to *CAMB I*—except here plaintiffs unsuccessfully asserted, to a unanimous court, a "right" to have their children attend neighborhood schools in contravention of the District's adopted middle school desegregation plan. This case established the rule that local school districts in Washington are responsible for and have the sole right to assign students to particular schools.

Dawson v. Troxel, 17 Wash.App. 129, 561 P.2d 694 (1977) (suit unsuccessfully challenging the District's policy denying majority race (white) children the option of transferring out of the predominantly minority Garfield High School attendance area; this policy was designed to promote the desegregation of Garfield);

Coney v. Seattle School District No. 1, Civil Action No. C75-650M before the United States District Court

for the Western District of Washington (concerning the same policy challenged in *Dawson* and demanding that Garfield be closed, school boundaries be changed to require all Seattle high schools to have the same ratio of black and white students, and the neighboring school districts be drawn into a "regional desegregation plan." (Complaint, pages 16-17 filed about September 9, 1975 and dismissed May 6, 1977);

Simmons v. Seattle School District No. 1, Civil Action No. C76-134V consolidated with *Nakamura v. Seattle School District No. 1,* Civil Action No. C76-135V before the United States District Court for the Western District of Washington (these two cases also involved the District's Garfield transfer policies and sought roughly the same relief as *Coney. Simmons* and *Nakamura* were filed about February 27, 1976. They were dismissed July 29, 1977);

Numerous complaints under Title VI of the 1964 Civil Rights Act have been filed with the Office for Civil Rights ("OCR") of the United States Department of Health, Education and Welfare ("HEW"). Some of these complaints involved teacher assignments and bilingual education requirements ("*Lau*" compliance—named after a related lawsuit (*Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974)) in which the District was not a party). The National Association for the Advancement of Colored People ("NAACP") filed a complaint with OCR on April 22, 1977 challenging the segregation of the Seattle Public Schools and calling upon OCR to terminate all federal funding to the District until it is desgregated. This complaint was settled by a Memorandum of Agreement between OCR and the District on June 7-8, 1978.

Roe, et al. v. Seattle School District No. 1 ("Roe I"), King County Superior Court Cause No. 838291, and *Roe, et al. v. Seattle School District No. 1 ("Roe II"),* King County Superior Court Cause No. 839530, filed about December 13, 1977 and January 13, 1978, respectively (these cases challenged and sought to enjoin the District's adoption and implementation of the Seattle Plan for elimination of racial imbalance adopted by the Seattle School Board on December 14, 1977. The cases were consolidated and dismissed pursuant to the District's motion for summary judgment. They are presently on appeal to the Washington State Supreme Court);

Velikanje, et al. v. Seattle School District No. 1 and Washington State Department of Ecology, Thurston County Superior Court of Washington Cause No. 78-2-00066-2, filed in July 1978 (seeks to enjoin operation of the Seattle Plan on the theory that the District did not prepare an environmental impact statement for it. Trial of this matter has been continued pending the outcome of this action).

6.2 Since 1963 Seattle has had voluntary racial transfer programs whereby students could transfer to schools outside their residential attendance area if doing so improved racial balance in the sending and receiving schools.

6.3 In 1971 the Board voted to adopt a middle school mandatory assignment desegregation plan. Implementation of the middle school plan, which involved the creation and maintenance of five racially-balanced middle schools through mandatory student assignments, was delayed one year by reason of *Citizens Against Mandatory Bussing v. Palmason*. Adoption of the middle school plan also prompted an effort to recall four Board members who voted for the plan. The recall effort failed by a narrow margin at the polls.

6.4 Effective August 1976, the Board hired a new Superintendent, Dr. David L. Moberly, and directed him to develop and implement a desegregation program for the Seattle schools.

6.5 During the school year 1976-77 and the summer of 1977 the Seattle School District developed, publicized, and encouraged participation in a "magnet" school desegregation program. The program, implemented in 1977-78, permitted students to transfer voluntarily from their "neighborhood" schools to "magnet" schools which contained educational programs designed to attract students.

6.6 The magnet program succeeded in promoting student movement to a greater degree than had ever before been experienced. It did not succeed, however, in attracting a sufficient number of white student participants to effect a racial balancing of the system. While much of the student movement prompted by the magnet program helped to

reduce racial imbalance, a disproprotionate amount of the overall movement was by black students.

6.7 During the 1975-78 school years, a disproportionate number of Seattle's black students were participating in Seattle's desegregation programs through their voluntary or mandatory transfer to schools outside their neighborhood.

6.8 Despite the existence of extensive voluntary, magnet, and mandatory middle school desegregation programs, racial imbalance in Seattle actually increased between the 1970-71 and 1977-78 school years. The Board, therefore, concluded that a voluntary student assignment plan, standing alone, without a mandatory assignment "backup," could not effect an acceptable racial balancing of the Seattle schools.

6.9 In June 1977 the Board, in Resolution 1977-8, defined "racial imbalance" as "the situation that exists when the combined minority student enrollment in a school exceeds the districtwide combined minority average by 20 percentage points, provided that the single minority enrollment (as defined by current federal categories) of no school will exceed 50 percent of the student body." The Board then resolved to eliminate minority racial imbalance in the public schools of Seattle by the 1979-80 school year. The Board also adopted Resolution 1977-9, which directed the formulation of an extensive planning and citizen involvement process to develop desegregation strategies.

6.10 On December 14, 1977, the Board adopted Resolution 1977-78 which selected the strategies to be used in eliminating Seattle's racial imbalance. On that same day the Board directed the school district administration to continue developing the desegregation plan, which came to be known as The Seattle Plan. This plan, for the 1978-79 school year, was adopted in March 1978.

6.11 A principal element of The Seattle Plan is the initial fixed assignment of entire neighborhoods of students to schools other than those geographically closest to their homes (their "neighborhood schools") for a portion of the students' K-12 school careers. The Seattle Plan contains significant voluntary assignment program options which

are consistent with the Plan's racial balancing goals.

6.12 In taking action to effect a racial balancing of the Seattle schools, those members of the Board who voted to adopt the Plan were motivated by a number of considerations. Among those were their desire to carry out the oath of office which each took as a condition precedent to taking office, their desire to ward off threatened litigation, their desire to prevent the threatened loss of federal funds, their desire to relieve the black students of the disproportionate burden which they had borne in the voluntary efforts to balance the schools racially and their perception that racial balance in the schools promotes the attainment of equal educational opportunity and is beneficial in the preparation of all students for democratic citizenship regardless of their race.

6.13 Implementation of the first-year phase of the Seattle Plan's two year program has substantially reduced the number of racially imbalanced schools in the district and has substantially reduced the percentage of minority students in those schools which remain racially imbalanced.

6.14 Segregated housing patterns exist in the City of Seattle. These segregated housing patterns result in racially imbalanced schools when a neighborhood school assignment policy is implemented.

6.15 The Board intends to continue full implementation of The Seattle Plan to the extent permitted by law.

6.16 If Initiative 350 is implemented it is probable that there would be significantly less black community support for and black student participation in any voluntary program for reducing racial imbalance in the Seattle schools.

7. *Circumstances Relating to Adoption of Initiative 350*

7.1 In December 1977, a group of Washington residents, who were opposed to the racial balancing strategies then being considered by the Seattle School Board, brought suit in King County Superior Court of the State of Washington (*Roe, et al. v. Seattle School District No. 1, et al.*, King County Superior Court Cause No. 838291) to

enjoin the Board's anticipated adoption of The Seattle Plan. The application for injunction was denied by Superior Court Judge George H. Revelle on the morning of December 14, 1977; The Seattle Plan (Resolution 1977-28) was adopted that afternoon.

7.2 Subsequent to the Board's adoption of The Seattle Plan, the same citizens and others brought another state court suit (*Roe, et al. v. Seattle School District No. 1, et al.*, King County Superior Court Cause No. 839530) to enjoin the scheduled fall 1978 implementation of The Seattle Plan.

7.3 The individuals who brought these two injunctive actions and others began in December 1977 to call themselves Citizens for Voluntary Integration Committee ("CiVIC"). On January 16, 1978 they formally chartered Citizens for Voluntary Integration Committee with the State of Washington as a Washington nonprofit corporation pursuant to the provisions of RCW 24.03.

7.4 CiVIC was formed because of its founders' opposition to The Seattle Plan.

7.5 As part of the effort of CiVIC and persons acting with CiVIC to halt The Seattle Plan, CiVIC proposed an initiative for submission to the voters of the state at the 1978 general election.

7.6 Initiative 350 was patterned after previous federal legislative enactments, including the Esch Amendment, 20 U.S.C. § 1714(a), the Byrd Amendment, P.L. 94-206, § 209(90) Stat. 22), reenacted as P.L. 94-439, § 208 (90 Stat. 1434), and the Eagleton-Biden Amendment, P.L. 95-205 (91 Stat. 1460).

7.7 The purpose of these federal legislative enactments was to stop busing for school desegregation purposes except where constitutionally required.

7.8 Exept for the assignment of students to effect racial balancing, the drafters of Initiative 350 attempted to preserve to school districts the maximum flexibility in the assignment of students.

7.9 Initiative 350 was developed as a response to racial balancing efforts in Seattle as embodied in The Seattle Plan.

7.10 For a time CiVIC adopted as its publicity and campaign slogan the expression "Ban the Plan," which referred to "banning" The Seattle Plan.

7.11 The District moved for summary judgment in the pending *Roe* actions in May 1978. Judge Howard granted the District's motion for summary judgment, dismissing all of plaintiffs' claims, and signed appropriate orders on June 21 and 26, 1978.

7.12 Several of the same persons who were plaintiffs in King County Cause Nos. 838291 and 839530 then filed suit (*Velikanje, et al. v. Seattle School District No. 1, et al.*) in July 1978 in Thurston County Superior Court of the State of Washington (Cause No. 78-2-00066-2) against the District and the Washington State Department of Ecology, praying that implementation of The Seattle Plan in the fall of 1978 be enjoined due to the District's failure, pursuant to a declaratory ruling from the Department of Ecology, to prepare an environmental impact statement (EIS) in connection with The Seattle Plan. This action is currently pending.

7.13 Prior to the November 7, 1978, election and pursuant to the provisions of RCW Ch. 29.81, the Secretary of State mailed to all registered voters in the State an official Voters' Pamphlet. That pamphlet contained the text of Initiative 350, an explanatory statement drafted by the Attorney General, and arguments by proponents and by opponents of the measure. In their arguments in the pamphlet for the initiative the proponents stressed, *inter alia*, the concepts of "forced busing" and the preservation of neighborhood schools. In their arguments the opponents stressed, *inter alia*, that the adoption of the initiative would rescind Seattle's desegregation plan and would significantly increase racial segregation in Seattle, Tacoma and Pasco.

7.14 The Voters' Pamphlet, the campaigns conducted by supporters and opponents of Initiative 350, newspaper editorials and articles, and other media coverage and publicity, made clear to the electorate that Initiative 350 would require dismantling of The Seattle Plan and would prohibit school district-directed assignment and transportation of students to other than their nearest or

next nearest schools for the purpose of racially balancing public schools in the State.

7.15 During the election campaign on Initiative 350, CiVIC announced its own desegregation plan for Seattle. This plan is known as "THE CiVIC PLAN."

7.16 Initiative 350 allows voluntary desegregation, *i.e.*, the voluntary transfer assignment of students to schools away from their neighborhoods.

7.17 A part of the strategy utilized by CiVIC to terminate The Seattle Plan was to inform citizens outside the Seattle area about "the problems of mandatory busing" in Seattle.

7.18 During the campaign the proponents of Initiative 350 represented that there would be no loss of school district flexibility other than in busing for desegregation purposes.

7.19 During 1978 there were 300 school districts in the State of Washington. CiVIC campaign publicity supporting Initiative 350 and speeches given by CiVIC representatives during the election campaign assured people in school districts throughout the state that "99% of the school districts in the state would not be affected by the passage of 350." Approximately one percent of the 300 school districts in the state *are* directly affected by Initiative 350. Those school districts are plaintiffs in this litigation: Pasco, Tacoma and Seattle.

7.20 Exhibit 58 contains CiVIC's legal analysis of the Initiative as published during the campaign by CiVIC. Exhibit 58, pp. 7-21, is a copy of two opinion letters from CiVIC's attorney. Component parts of Exhibit 58 were widely circulated by CiVIC during the election campaign.

7.21 Some proponents of Initiative 350 asserted The Seattle Plan would result in substantial "white flight" and thus make desegregation impossible in Seattle. They asserted voluntary desegregation programs under Initiative 350 would prevent "white flight" and thus promote desegregation.

7.22 The terms "busing," "forced busing" and "mandatory busing," in the context of Initiative 350 were synonymous with compulsory student school reassignment

and transportation for racial balancing or desegregation purposes.

7.23 CiVIC campaign publicity supporting Initiative 350 made reference to the following: Initiative 350 and race issues [Exs. 47, 46]; "forced busing" causes greater segregation [Ex. 47, p. 1]; Seattle is not under a federal court order to desegregate [Ex. 47, p. 2; Exs. 59, 60]; "forced busing" to desegregate the public schools has not worked in other cities [Ex. 47, p. 2]; Initiative 350 "will eliminate" Seattle's "ability to use massive busing for desegregation purposes" [Ex. 51, p. 2]; Initiative 350 guarantees that state "funds are not used for forced busing of students based on racial identification" [Ex. 51, p. 5]; racial imbalance [Exs. 59, 60]; forced busing [Tr. 544, 662, 715, 801; Ex. 47, pp. 1, 3; Ex. 51, pp. 21, 24, 27; Ex. 52, p. 6; Exs. 53, 55, pp. 1-2; Ex. 56, pp. 2-4; Ex. 57, pp. 5-6, 8, 13, 15; Exs. 59, 60, 61, 62, 64, 65, 66, 67]; integration [Tr. 539; Exs. 61, 62, 64, 65, 67]; and segregation/desegregation [Tr. 539; Exs. 61, 62, 63, 64].

7.24 On November 7, 1978, Initiative 350 was approved by the voters by a margin of approximately 66 percent statewide.

7.25 In Seattle, the unofficial vote in favor of the measure was approximately 61 percent. In two Seattle Legislative Districts—Legislative District 37 and Legislative District 43—Initiative 350 failed. In Legislative District 37, where a majority of voters are racial minorities, the vote was approximately 61 percent against Initiative 350. In Legislative District 43, the vote was approximately 54 percent against the Initiative.

7.26 Initiative 350 would have taken effect as law in the State of Washington 30 days after the November 7 election, *i.e.*, on December 7, 1978 had not this litigation been initiated and a preliminary injunction issued.

7.27 The leadership of CiVIC has acted legally and responsibly in its advocacy of Initiative 350. In campaigning for the passage of Initiative 350 CiVIC has not directed its appeals to the racial biases of the voters.

7.28 It is clear from the location of school buildings and the attendance lines drawn around those buildings that the Seattle School District has traditionally adhered to a

policy of the assignment of children to their neighborhood schools.

7.29 CiVIC, its agents and consultants deliberately took steps to avoid race becoming an issue in the campaign, since, they felt, its interjection into the campaign would have lost support for the initiative.

7.30 Many parents and voters who support neighborhood schools do so in a sincere belief in the value of neighborhood schools irrespective of the racial distribution of the students attending those schools.

7.31 A neighborhood school policy has certain advantages in that it facilitates community and parental input and support for educational and extracurricular programs; it minimizes safety hazards to children in reaching school; it reduces the cost of transportation; it eases the task of student assignment through the use of easily determined standards; and it makes for better home-school communication.

7.32 Parents consider the quality and location of neighborhood schools an important factor when deciding whether or not to purchase, rent or lease a home in a given community.

7.33 Those voters who voted for Initiative 350 were not all motivated to do so by the same reason. Voters were motivated to do so by a number of reasons. It is impossible to ascertain all of those reasons nor to determine the relative impact of those reasons upon the electorate.

8. *General Effects of Initiative 350 on Plaintiff School Districts*

8.1 Implementation of Initiative 350 will compel those school districts which have adopted compulsory student assignment as a means of racially balancing their schools, to abandon all those efforts which cannot be accomplished by the transfer of students to their nearest or next nearest schools. Those school districts will in consequence become more racially imbalanced than they are at present.

8.2 If permitted to become law, Initiative 350 will remove from local school districts their existing authority

under state law (declared in *Citizens Against Mandatory Bussing v. Palmason*, 80 Wash.2d 445, 495 P.2d 657 (1972)) to assign students to other than their nearest or next nearest schools in order to improve racial balance.

8.3 Except for racially-balancing purposes, Initiative 350 permits local school districts to assign students other than to their nearest or next nearest schools for most, if not all, of the major reasons for which students are at present assigned to schools other than their nearest or next nearest schools.

8.4 Section 3 of Initiative 350 lists seven tools or methods which educational authorities are specifically prohibited from utilizing to require attendance by students at schools other than their nearest or next nearest schools. Each of those seven tools or methods is an element of The Seattle Plan.

8.5 It would be impossible to effect a racial balance of Seattle schools without resort to some or all of the tools or methods prohibited by Section 3 of Initiative 350.

8.6 The seven tools or methods prohibited by Section 3 of Initiative 350 are commonly found in public school racial desegregation plans put into effect in this country during the past 25 years.

8.7 Section 6 of Initiative 350 requires a judicial declaration of duty to desegregate before a local school district may with assurance mandatorily reassign students to other than their nearest or next nearest schools for racial balancing purposes. No other aspect of mandatory student assignment is burdened with this requirement.

8.8 Except for the busing of students for racial balancing purposes, almost all of the busing of students currently taking place in this state is permitted by Initiative 350.

9. *Effects of Initiative 350 on Pasco*

9.1 Because of the housing patterns in Pasco, it is doubtful that the Pasco schools can be racially balanced within the "nearest or next nearest" restrictions of Initiative 350.

10. *Effects of Initiative 350 on Tacoma*

10.1 If implemented, Initiative 350 will make it impossible for Tacoma schools to maintain their present racial balance.

11. *Effects of Initiative 350 on Seattle*

11.1 If implemented, Initiative 350 will prevent the racial balancing of a significant number of Seattle schools and will cause the school system to become more racially imbalanced than it presently is.

11.2 If subject to the limitations of Initiative 350, the Seattle schools cannot attain the goal of racial balancing set by The Seattle Plan.

11.3 It is impossible at this time to know or to predict whether The Seattle Plan will cause more or less movement of white families from the Seattle School District than would occur under Initiative 350. Under Initiative 350, however, there is certain to be movement of white parents away from those residential areas where there is a preponderance of minority families.

12. *Supplemental Findings*

(The numbers of these supplemental findings indicate the sections in which these findings should fall.)

3.1(a) The adverse effects of racially imbalanced schools fall most heavily upon minority students.

8.9 Initiative 350 does not permit a school board to assign students for the purpose of remedying *de jure* segregation in the absence of a court declaration or order requiring the board to do so.

8.10 Initiative 350 does not permit a local community which desires a racially-integrated educational experience for its students to cause students to be assigned to schools other than their nearest or next nearest schools in order to accomplish that purpose in the absence of a court declaration or order requiring the school board of that district to do so.

From the foregoing Findings of Fact, the Court draws the following:

CONCLUSIONS OF LAW

1. The jurisdiction of this Court exists under United States Code Title 28, Sections 1331 and 1343.

2. This action presents questions of actual controversy between the parties involving substantial legal and constitutional issues as to the validity of Initiative 350.

3. Initiative 350 is unconstitutional in that it denies equal protection of the laws to racial minorities in contravention of the Fourteenth Amendment to the United States Constitution in the following respects:

1. It creates an impermissible racial classification by forbidding mandatory student assignments for racial reasons while permitting such assignments for purposes unrelated to race. *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969); *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y. 1970), aff'd 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971). No compelling state interest justifies that racial classification.

2. A racially discriminatory intent or purpose was one of the factors which motivated the adoption of the initiative. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Village of Arlington Heights v. Metropolitan Housing Develop. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Personnel Administrator of Massachusetts v. Feeney*, 39 CCH S.Ct.Bull. 2918 (June 5, 1979).

3. It is overly inclusive in that it prohibits a school district from implementing a mandatory student assignment program even though the school district may be under a constitutional duty to eliminate segregation. *North Carolina Board of Education v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971); *Green v. County School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968); *San Francisco Unified Sch. Dist. v. Johnson*, 3 Cal.3d 937, 92 Cal. Rptr. 309, 479 P.2d 669 (1971).

4. Plaintiffs are entitled to a declaratory judgment declaring Initiative 350 to be unconstitutional.

5. Plaintiffs are entitled to a permanent injunction against the enforcement of the provisions of Initiative 350 by defendants or any of their instrumentalities, agents or employees.

MEMORANDUM OPINION

I am filing this memorandum opinion in conjunction with my findings of fact and conclusions of law in order to spell out the reasoning behind my conclusions.

Although Initiative 350 was adopted by a referendum vote, it is clear that the sovereignty of the people is subject to constitutional limitations just as are legislative enactments. *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969). For that reason the initiative is necessarily subject to the same scrutiny that it would be had it been adopted by the legislature.

After considering all of the evidence and all applicable law, I am compelled to find Initiative 350 unconstitutional upon several grounds: (1) it forbids mandatory student assignments for racial reasons but permits such student assignments for purposes unrelated to race, (2) a racially discriminatory purpose was one of the factors which caused Initiative 350 to be adopted, and (3) the initiative is overly inclusive in that it permits only court-ordered busing of students for racial purposes even though a school board may be under a constitutional duty to do so even in the absence of a court order.

In making the finding that the initiative is unconstitutional because it permits busing for non-racial reasons but forbids it for racial reasons, I rely primarily upon *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969) and *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971).

In *Hunter* the electorate of the City of Akron amended the charter of that city to provide that any ordinance enacted by the city council dealing with racial, religious or ancestral discrimination in housing would not become effective unless approved by a majority of the city voters. The charter imposed this requirement of voter approval upon no other type of ordinance. The Supreme Court found this amendment to be a denial of the equal protection of the laws in that it created an explicitly racial classification by treating racial discrimination in housing differently from all other matters relating to housing. By making it more

difficult for minorities to secure the enactment of an ordinance dealing with racial discrimination, the charter placed burdens upon racial minorities within the governmental process that it did not place upon other citizens. It hence denied to those minorities the equal protection of the laws.

In *Lee v. Nyquist* a three-judge court applied the *Hunter* rationale to strike down a New York statute which provided as follows:

> "Except with the express approval of a board of education * * * a majority of the members of such board having been elected, no student shall be assigned or compelled to attend any school on account of race * * *"

The court found that while the State Commissioner of Education had broad supervisory powers over local public education with regard to all matters affecting educational policy, the statute singled out for different treatment the assignment of students on account of race. The court stated at page 719:

> "The statute thus creates a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools."

The court added:

> "We can conceive of no more compelling case for the application of the *Hunter* principle."

The provisions of Initiative 350 relevant to this opinion are as follows:

> Section 1. * * * no school board * * * shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence * * * except in the following instances:
>
> (1) If a student requires special education, care or guidance * * *
>
> (2) If there are health or safety hazards * * * or physical barriers or obstacles * * * between the

student's place of residence and the nearest or next nearest school; or

(3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities.

Section 3. For purposes of section 1 of this act "indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence * * *," includes, but is not limited to, implementing, continuing, pursuing, maintaining or operating any plan involving (1) the redefining of attendance zones; (2) feeder schools; (3) the re-organization of the grade structure of the schools; (4) the pairing of schools; (5) the merging of schools; (6) the clustering of schools; or (7) any other combination of grade restructuring, pairing, merging or clustering: PROVIDED, That nothing in this chapter shall limit the authority of any school district to close school facilities.

Section 4. For the purposes of section 1 of this act, "special education, care or guidance" includes the education, care or guidance of students who are physically, mentally or emotionally handicapped.

Section 5. The prohibitions of this chapter shall not preclude the establishment of schools offering specialized or enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students.

Section 6. This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools.

Sections 1 and 4 of the initiative expressly provide that a school board may require a student to attend any school, even though not the one nearest or next nearest his place of residence, for a variety of reasons unrelated to race. A school board may require a student to attend whatever school it chooses if the student is in need of special education of any kind or if the student is suffering from any physical, mental, or emotional handicap or if there are health or safety hazards connected with his attending his nearest or next nearest school or if the nearest or next

nearest school is inadequate by reason of overcrowding or the lack of physical facilities.

The foregoing reasons for mandatory student assignment comprise one major exception the primary reasons that students are at the present time being assigned to schools other than their neighborhood schools. That one major exception is the assignment of students for racial balancing purposes. Student assignment for that purpose is not permitted by Initiative 350.

By omitting assignments for racial reasons from the list of permitted categories of student assignments, Initiative 350 effects implicitly the same type of racial classification which the New York statute in *Lee v. Nyquist* effected expressly.

Although the initiative does not explicitly disallow student assignment for racial reasons, as did the New York statute considered in *Lee v. Nyquist*, it achieves the same purpose by enumerating those purposes for which there may be student assignment and omitting from that enumeration the assignment of students in order to achieve racial balance. This is as effective a racial classification as is a statute which expressly forbids the assignment of students for racial balancing purposes. It is no less a denial of the equal protection of the law to minorities.

As a second ground for holding Initiative 350 to be unconstitutional, I find that a racially discriminatory purpose was one of the factors which motivated the conception and adoption of the initiative.

In *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the Supreme Court held that a governmental action was not a denial of equal protection simply because that action had a racially disproportionate impact. For the action to be unconstitutional the Court held that there must be proof that there was in addition a racially discriminatory intent or purpose.

It is, of course, impossible to ascertain the subjective intent of those who enacted Initiative 350. It was a measure adopted by the electorate at the ballot box. Unlike the normal legislative enactment there were no committee hearings or floor debates to cast light upon the intent of the enactors.

I believe that I can safely assume that a great many voters were motivated solely by a conviction that it was in the best interests of all children that they be permitted to attend their neighborhood schools; that there were many voters who were motivated solely by a desire to maintain as much racial separation as possible in the public schools; and that in between there were many voters who voted with varying degrees of mixed motives.

In deciding whether a racially discriminatory intent or purpose lay behind the adoption of Initiative 350, I cannot base my judgment upon what I believe I may "safely assume" as to the subjective intent of the voters. As to that subjective intent the secret ballot raises an impenetrable barrier.

The fact that it is impossible to determine whether there was subjectively a racially discriminatory intent or purpose does not, however, relieve this court of the burden of determining whether there was in fact such an intent or purpose behind the adoption of Initiative 350. One must simply look elsewhere than within the minds of the voters.

Two Supreme Court cases, *Village of Arlington Heights v. Metropolitan Housing Develop. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) and *Personnel Administrator of Massachusetts v. Feeney*, 39 CCH S.Ct.Bull. 2918 (June 5, 1979), give guidance to a court in determining in an objective fashion whether a discriminatory intent or purpose was a motivating factor in governmental action.

In *Arlington Heights* three black petitioners and a development corporation challenged a denial by the village of an application for the rezoning of a tract of land from a single-family to a multiple-family classification. The rezoning was assertedly to enable the developer to build a racially-integrated, low and moderate income housing project upon the land. In trying to determine whether there was a racially discriminatory intent in the denial of the application, the Court considered five factors:

a) The impact of the action, i.e., whether it bore more heavily upon one race than upon another;

b) The historical background of the decision;

c) The specific sequence of events leading to the decision;

d) The procedural and substantive departures from the norm in connection with the decision or action; and

e) The legislative or administrative history of the decision or action.

In considering these five factors, the Court found that the tract of land had been zoned for single-family residences since 1959 when the village first adopted its zoning map; that single-family homes surrounded the tract of land in question; that the village had always been committed to single-family homes as its dominant residential land use; that there had been no departure from normal procedure in the consideration of the application; and that the zoning denial did not appear substantively improper in light of all the information which was before the zoning board. Based upon a consideration of those factors, the Court held that no discriminatory intent or purpose had been demonstrated in the denial of the rezoning application.

In *Feeney* the Court again applied the *Arlington Heights* factors. In that case the Court upheld a veterans' preference law in Massachusetts that had been challenged on the ground that it discriminated against women. The Court examined the relevant legislative history and found that a veterans' preference was first declared by Massachusetts in 1884 and that from its inception the law established a preference for veterans over nonveterans, not a preference for men over women. The Court analyzed past legislative actions with respect to military service and found that veterans were overwhelmingly male largely because women had never been subject to a military draft. Given the sexual neutrality of the statutory history and the sexual one-sidedness of military service, the Court found that an intent to discriminate against women had not been a motivating factor in the enactment or extension of the veteran's preference law in Massachusetts and that it was in consequence not a denial of equal protection.

Examining Initiative 350 in light of the factors articulated by the Supreme Court in *Arlington Heights* and

Feeney, one is led to the conclusion that a racially discriminatory purpose was in fact a motivating factor in the passage of Initiative 350.

The first consideration is that of the impact of the action. While it is true that a statute cannot be held unconstitutional solely because it has a racially disproportionate impact, the impact of the action must be weighed in determining whether there was discriminatory intent. Justice Stevens, in his concurring opinion in *Washington v. Davis*, observed at 426 U.S. page 253, 96 S.Ct. at page 2054:

> "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds."

In *Feeney* the Court noted that discriminatory purpose implied more than an awareness of the consequences of one's actions but added that when adverse consequences of a law upon a minority are inevitable "a strong inference that the adverse effects were desired can reasonably be drawn." (n. 25, p. 2942)

It appears from the evidence that the overall education of students in a school system suffers when the schools of that system are racially imbalanced, that the greater the imbalance the greater the impairment and that there is a disproportionate impact upon the education of minority children when their schools are racially imbalanced.

Beyond question the informed voters of the state, and the voters in general in Seattle, were well aware that the passage of Initiative 350 would terminate the efforts which had been taken by school boards of the state to balance schools racially by the mandatory busing of students. Given the segregated housing patterns of the three plaintiff school districts, the termination of those efforts could only result in racially-imbalanced schools in those districts and a disproportionate impact upon minority students. This impact of Initiative 350 was a certainty, in marked contrast to the uncertain and speculative impact of the verbal skills test used to select police recruits in *Washington v. Davis* and

the denial of the rezoning application in *Arlington Heights.*

The second and third factors utilized by the Court in *Arlington Heights* were the historical background of the decision and the specific sequence of events leading to the decision. In *Washington v. Davis, Arlington Heights* and *Feeney,* the Court examined all events surrounding the action in question: legislative enactments, board hearings, floor debates, and historical circumstances at the time each action was taken. In each of these situations, the Court found a race or gender-neutral pattern of conduct, with no evidence that would suggest a discriminatory purpose as a motivating factor in the decision-making process.

The same cannot be said with respect to the adoption of Initiative 350 inasmuch as it was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments. If implemented, the initiative will achieve that purpose. One must assume therefore that the voters, in adopting the initiative, intended to accomplish the very purpose for which the initiative was designed and intended therefore the disproportionate racial impact which its implementation will have.

The very words of the initiative reveal the intent to frustrate the plan of the Seattle School Board. Section 3 of the initiative expressly forbids the use of the entire panoply of tools or methods adopted by the board in its plan for racially balancing the Seattle schools. Except for voluntary student assignment options, Section 3 forbids every major, effective technique for achieving racial balance.

The historical background and sequence of events leading up to the adoption of the initiative reveals a whole series of lawsuits and a recall election, the objective of which was to prevent the racial balancing of Seattle schools by means of mandatory student assignments. It reveals, too, that the adoption of the plan of racial balancing by the Seattle School Board was the event which gave rise to the thought of a statewide initiative as a means of thwarting that decision.

The court in *Arlington Heights* also considered proce-

dural and substantive departures from the norm as factors bearing upon intent or purpose.

In the adoption of Initiative 350 there was a marked departure from the procedural norm in that an administrative decision of a subordinate local unit of government, the Seattle School Board, was overridden in a statewide initiative by voters, a great number of whom were entirely unaffected by that plan and who could not conceivably be affected by any plan for the mandatory assignment of students for racial balancing purposes.

It was also a marked departure from the norm, in terms of historical and current practices of local school districts, for the autonomy of school boards to be restricted relative to the assignment of students. Traditionally, student assignment has been a proper function of school boards. Local autonomy of school districts has long been recognized as a vital national tradition. *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). Even the New York statute in *Lee v. Nyquist* did not attempt to proscribe the student assignment powers of elected school boards. Yet Initiative 350 reaches all school boards. This state preemption of local autonomy, when directed at racial concerns, is clearly a departure from prior state practice.

The racially disproportionate impact of the initiative when coupled with its historical background, the sequence of events leading to its adoption and the departure from the procedural norm demonstrate that a racially discriminatory intent or purpose was at least one motivating factor in the adoption of the initiative.

Even if Initiative 350 were not unconstitutional on its face and even if racially discriminatory purpose were not one of the motivating factors in its formation and purpose the initiative must still fall by reason of the breadth of its impact.

I find that Initiative 350 is overly inclusive in that it prohibits school assignments to achieve racial balance even in a school district where there is *de jure* segregation, that is, segregation caused by prior governmental action.

School boards of districts in which there is *de jure* segregation are charged with an affirmative duty to take

whatever steps might be necessary to eliminate that segregation. *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971); *Green v. County School Board of New Kent County*, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). A statute which proscribes one of the means, if not the only means, of achieving that end must yield to constitutional requirements. *San Francisco Unified Sch. Dist. v. Johnson*, 3 Cal.3d 937, 92 Cal.Rptr. 309, 479 P.2d 669, 680 (1971).

Initiative 350 makes no provision for a school board which may have a constitutional obligation to remedy *de jure* segregation. The initiative proscribes a school board's use of student assignment in order to achieve racial balance under *any* circumstances. Any school board which is of the opinion that *de jure* segregation exists within its district is placed in the untenable position of being in violation of constitutional requirements or of being in violation of the prohibitions of Initiative 350. Its only recourse under the initiative is to initiate litigation in order to have a court declare the course of action that it should take.

Plaintiffs contend that Initiative 350 is violative of the Washington State Constitution. As to that contention, I make no finding.

Because Initiative 350 is violative of the United States Constitution, plaintiffs are entitled to a permanent injunction against the enforcement of Initiative 350 by defendants, their instrumentalities, agents or employees.

APPENDIX B

SEATTLE SCHOOL DISTRICT No. 1 et al., Plaintiffs-Appellees,

v.

THE STATE OF WASHINGTON et al., Defendants-Appellants.

Nos. 79-4643, 79-4655, 79-4676, 79-4740,
79-4801 and 79-4802.

United States Court of Appeals,
Ninth Circuit

Argued and Submitted June 30, 1980.
Decided Dec. 16, 1980.

Before ELY, WRIGHT and NELSON, Circuit Judges.

ELY, Circuit Judge:

This cause comes before the Court in an unusual posture. Local elected school authorities, who so often in the past in other jurisdictions have resisted court-ordered integration, have in this instance invoked the jurisdiction of the federal courts because their self-generated efforts to achieve racial balance in the public schools have been hindered by governmental action. Successful, locally-formulated public school desegregation programs in Washington are today threatened with extinction through enforcement of a Washington State statute by State officials.

The Seattle, Tacoma, and Pasco, Washington, school boards, in an effort to correct substantial racial imbalance in the public schools in those communities, have in recent years implemented a series of voluntary and mandatory desegregation programs. Because of persistently segregated residential housing patterns in the three metropolitan areas, these desegregation plans have necessarily entailed some assignment of students to schools other than those closest to their homes. The success of these programs has been manifest, and the "Seattle Plan" in particular has been hailed as a model for other large cities.

The continued efficacy of these programs became

imperiled, however, in November 1978, when Washington voters adopted ballot Initiative 350 by a substantial statewide margin. Initiative 350 provides, in pertinent part, that:

> no school board * * * shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence * * *.

In November 1978, after the State threatened enforcement of Initiative 350, the three school districts filed a complaint in the District Court seeking a declaratory judgment that the statute was unconstitutional under the equal protection clause of the Fourteenth Amendment. In December 1978, prior to certification of Initiative 350 as a state law pursuant to Wash.Rev.Code § 29.62.130 (1974), the District Court issued a temporary restraining order barring enforcement. On February 9, 1979, the District Court issued a preliminary injunction continuing to block implementation of the statute and at the same time granted the motion of eight Washington public interest groups to intervene. Also on February 9, the District Court bifurcated the litigation. Phase I, from which this appeal is taken, was limited to the question of the constitutionality of Initiative 350. Phase II issues, which were not reached at trial because the District Court held that the statute violated the Fourteenth Amendment, derive from the intervenors' claim that the school districts operate unconstitutional dual school systems.

After an extended trial, District Judge Voorhees, on June 15, 1979, issued a Memorandum Opinion, together with Findings of Fact and Conclusions of Law, declaring Initiative 350 unconstitutional. *Seattle School Dist. No. 1 v. State of Washington*, 473 F.Supp. 996 (W.D. Wash. 1979). He concluded that Initiative 350 was unconstitutional on three distinct grounds:

> (1) it forbids mandatory student assignments for racial reasons but permits such student assignments for purposes unrelated to race, (2) a racially discriminatory purpose was one of the factors which caused Initiative 350 to be adopted, and (3) the initiative is overly

> inclusive in that it permits only court-ordered busing of students for racial purposes even though a school board may be under a constitutional duty to do so even in the absence of a court order.

473 F.Supp at 1012.

On August 29, 1979, the District Court issued a final order declaring Initiative 350 unconstitutional and permanently enjoining its enforcement. Also on August 29, the District Court issued a separate order denying the school districts' and intervenors' separate motions for attorney's fees.

Appellants, the State of Washington and various state officials, appeal from the District Court judgment declaring Initiative 350 unconstitutional. Appellees, the three Washington school districts and intervenors, cross-appeal from the order denying their motion for attorney's fees. One of the intervening appellees, East Pasco Neighborhood Council, also cross-appeals from the denial of its motion that the Pasco School District be dismissed as a plaintiff.[1] The United States appeared, and continues to appear, as an *intervenor* in support of the plaintiffs-appellees.

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[1]The Council raises a threshold jurisdictional question, arguing that because the State has not threatened to enforce Initiative 350 against Pasco School District ("Pasco"), it does not have standing to challenge the statute under the Declaratory Judgment Act, 28 U.S.C. § 2201 (1979). We disagree. It is true that claims alleging the unconstitutionality of a statute are normally non-justiciable in the absence of immediate threatened prosecution. *Poe v. Ullman*, 367 U.S. 497, 501-09, 81 S.Ct. 1752, 1754-59, 6 L.Ed.2d 989 (1961). Nevertheless, if the circumstances of the dispute provide sufficient guarantees that a genuine case or controversy exists, a federal court may assume jurisdiction even in the absence of a direct threat of enforcement against the plaintiff. *See Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297-305, 99 S.Ct. 2301, 2308-12, 60 L.Ed.2d 895 (1979); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 682-84, 97 S.Ct. 2010, 2014-15, 52 L.Ed.2d 675 (1977); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 136-48, 95 S.Ct. 335, 354-61, 42 L.Ed.2d 320 (1974); *Steffel v. Thompson*, 415, U.S. 452, 458-60, 94 S.Ct. 1209, 1215-16, 39 L.Ed.2d 505 (1974); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 504-08, 92 S.Ct. 1749, 1754-56, 32 L.Ed.2d 257 (1972); *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

In this case, four factors indicate that an actual case or controversy exists between Pasco and the State despite the absence of a specific threat, as against Pasco, to enforce Initiative 350. First, this is a highly

I. *Constitutionality of Initiative 350—The Appeal*

We find it unnecessary to discuss the District Court's holding that Initiative 350 was motivated by a discriminatory purpose and is unconstitutionally overbroad because we conclude that the statute was correctly struck down as an impermissible legislative classification based on racial criteria. Hunter v. Erickson, 393 U.S. 385, 391-93, 89 S.Ct. 557, 560-61, 21 L.Ed.2d 616 (1969); *Lee v. Nyquist*, 318 F.Supp. 710, 718-20 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971).

We note at the outset the operative legal and political effect of Initiative 350. As the District Court below said, the statute "was conceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments." 473 F.Supp. at 1015.[2] We agree with the District Court that

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specific statute, clearly applicable to Pasco's student assignment policies. *See Doe v. Bolton*, 410 U.S. 179 at 187-89, 93 S.Ct. 739 at 745-46, 35 L.Ed.2d 201; *Crossen v. Breckenridge*, 446 F.2d 833, 838 (6th Cir. 1971). Second, Initiative 350 is a recent statutory enactment and not a law which has lain moribund for years. *See Poe v. Ullman*, 367 U.S. at 501, 81 S.Ct. at 1754; *Rincon Band of Mission Indians v. County of San Diego*, 495 F.2d 1, 12 (9th Cir.), *cert. denied*, 419 U.S. 1008, 95 S.Ct. 328, 42 L.Ed.2d 283 (1974) (Browning, J., dissenting). Third, there have been immediate threats of enforcement against parties whose legal status under Initiative 350 is identical to that of Pasco, *i.e.*, the Seattle and Tacoma School Districts. *See Steffel v. Thompson*, 415 U.S. at 459, 94 S.Ct. at 1215 (prosecution of plaintiff's companion); *Carey v. Population Servs. Int'l*, 431 U.S. at 684 n.3, 97 S.Ct. at 2015 n.3 (prosecution under predecessor statute). Fourth, because this is a civil rather than a criminal statute, it imposes an affirmative duty to comply. "[I]f appell[ees] are now under such an obligation, that in and of itself makes their attack on the validity of the law a live controversy, and not an attempt to obtain an advisory opinion," *Lake Carriers Ass'n v. MacMullan*, 406 U.S. at 507, 92 S.Ct. at 1755 at least where there is an indication, as in this case, that the statute will be enforced in the future. *Id. See also Independent Bankers Ass'n v. Heimann*, 613 F.2d at 1164, 1167 (D.C. Cir. 1979); *Southern Pac. Transp. Co. v. Redden*, 458 F.Supp. 593, 599-60 (D. Or. 1978).

[2]Judge Voorhees' Finding of Fact No. 8.2 was that "Initiative 350 will remove from local school districts their existing authority under state law * * * to assign students to other than their nearest or next nearest schools in order to improve racial balance." 473 F.2d at 1010 (*Citing Citizens Against Mandatory Bussing v. Palmason*, 80 Wash.2d 445, 495 P.2d 657 (1972) (en banc)). This finding is supported by the evidence and the conclusion is not clearly erroneous. Fed.R. Civ.P. 52(a).

> [a]lthough the initiative does not explicitly disallow student assignment for racial reasons, as did the New York statute considered in *Lee v. Nyquist*, it achieves the same purpose by enumerating those purposes for which there may be student assignment and omitting from that enumeration the assignment of students in order to achieve racial balance. This is as effective a racial classification as is a statute which expressly forbids the assignment of students for racial balancing purposes.

Id. at 1013.[3] Initiative 350 embodies a constitutionally-suspect classification based on racial criteria because it legislatively differentiates student assignment for purposes of achieving racial balance from student assignment for any other significant reason.[4]

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[3]Initiative 350 provides in its entirety as follows:

Section 1. Notwithstanding any other provision of law, after the effective date of this act no school board, school district, educational service district board, educational service district, or county committee, nor the superintendent of public instruction, nor the state board of education, nor any of their respective employees, agents or delegates shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence within the school district of his or her residence and which offers the course of study pursued by such student, except in the following instances:

(1) If a student requires special education, care or guidance, he may be assigned and transported to the school offering courses and facilities for such special education, care or guidance;

(2) If there are health or safety hazards, either natural or man made, or physical barriers or obstacles, either natural or man made, between the student's place of residence and the nearest or next nearest school; or

(3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities.

Section 2. In every such instance where a student is assigned and transported to a school other than the one nearest his place of residence, he shall be assigned and transported to the next geographically nearest school with the necessary and applicable courses and facilities within the school district of his or her residence.

Section 3. For purposes of section 1 of this act, "indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence within the school district of his or her residence and which offers the course of study pursued by such student" includes, but is not limited to, implementing, continuing, pursuing, maintaining or

The constitutional framework established in *Hunter v. Erickson* and *Lee v. Nyquist* dictates that Initiative 350 must fall. In *Hunter*, the Supreme Court invalidated an amendment to the Akron City charter requiring that any fair housing ordinance passed by the city council be approved by a majority of the city voters prior to becoming law. The Court struck down the amendment on equal protection grounds because it created "an explicitly racial

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operating any plan involving (1) the redefining of attendance zones; (2) feeder schools; (3) the reorganization of the grade structure of the schools; (4) the pairing of schools; (5) the merging of schools; (6) the clustering of schools; or (7) any other combination of grade restructuring, pairing, merging or clustering: PROVIDED, That nothing in this chapter shall limit the authority of any school district to close school facilities.

Section 4. For the purposes of section 1 of this act "special education, care or guidance" includes the education, care or guidance of students who are physically, mentally or emotionally handicapped.

Section 5. The prohibitions of this chapter shall not preclude the establishment of schools offering specialized or enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students.

Section 6. This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools.

Section 7. Sections 1 through 6 of this act are added to chapter 223, Laws of 1969 ex. sess. and shall constitute a new chapter in Title 28A RCW.

Section 8. If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.

'Judge Voorhees' Finding of Fact No. 8.3 was that "[e]xcept for racially balancing purposes, Initiative 350 permits local school districts to assign students other than to their nearest or next nearest schools for most, if not all, of the major reasons for which students are at present assigned to schools other than their nearest or next nearest schools." 473 F.Supp. at 1010.

That the statute does not contain an explicit racial classification is of no consequence if the law is not neutral. In *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), the Supreme Court clearly indicated that "[i]f the [challenged statutory] classification itself, *covert or overt*, is *not* based upon gender, the *second question* is whether the adverse effect reflects invidious gender-based discrimination." *Id.* at 274, 99 S.Ct. at 2293 (emphasis added). Because, as discussed above, Initiative 350 contains a covert racial classification, it is not a neutral law and the disparate impact analysis does not apply.

classification treating racial housing matters differently from other racial and housing matters." 393 U.S. at 389 S.Ct. at 559.

The Court in *Hunter* also noted that the amendment "not only suspended the operation of the existing ordinance forbidding housing discrimination," but also restructured the existing political process to require the approval of the electorate before any future ordinance could take effect. *Id.* at 389-90, 89 S.Ct. at 559-60. By so altering the governmental structure on matters concerning a racial distinction, making it more difficult for minorities to secure favorable legislation, the amendment placed unconstitutional "special burdens on racial minorities within the governmental process." *Id.* at 391, 89 S.Ct. at 560. We agree that "[t]he principle of *Hunter* is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." *Lee v. Nyquist*, 318 F.Supp. at 718.

In *Lee*, a three-judge district court applied *Hunter* to strike down a New York statute that prohibited racially-conscious student assignment by appointed school boards, but not by elected boards. The statute was unconstitutional, the court said, because it "creates a clearly racial classification, treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools." 318 F.Supp. at 719.

Applying these principles here, it is manifest that Initiative 350 both creates a constitutionally-suspect racial classification and radically restructures the political process of Washington by allowing a state-wide majority to usurp traditional local authority over local school board educational policies. Initiative 350 implicitly effects precisely the same classification which was made explicit in *Lee*; the law treats a single purpose for student assignment, racial balancing, differently from all others. Though Initiative 350 creates the differential classification indirectly by omission, there is no basis for distinguishing it as a matter of constitutional law from the explicit classifications of

Hunter and *Lee*. Unless this Court affirms the relevancy of the constitutional analysis applied in *Hunter* and *Lee* to this case, the guarantee of equal protection of laws will become a hollow shell. Lawmakers who seek to establish impermissible racial classifications will in the future be able to achieve, by artfully worded statutes like Initiative 350, constitutionally forbidden goals.

The racial classification embodied in the statute is invlaid unless it is the least drastic means required to achieve a compelling state interest. *McLaughlin v. Florida*, 379 U.S. 184, 192-96, 85 S.Ct. 283, 288-90, 13 L.Ed.2d 222 (1964). *See Hunter v. Erickson*, 393 U.S. at 391-93, 89 S.Ct. at 560-61; *Lee v. Nyquist*, 318 F.Supp. at 720. We have no reason to dispute the District Court's finding that the legislative purpose of Initiative 350 was to restore the Seattle School District's traditional policy of assigning students to their neighborhood schools.[5] However, while "[a] neighborhood school policy is not constitutionally suspect," *Diaz v. San Jose Unified School Dist.*, 612 F.2d 411, 415 (9th Cir. 1979), it is the locally elected school authorities who "are traditionally charged with broad power to formulate and implement educational policy." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971). Locally elected school boards even possess "broad discretionary powers" to prescribe a fixed proportion of racial mix in each school as an educational policy. *Id.*

In fact, the Supreme Court struck down a North Carolina statue that flatly prohibited the assignment of any public school student on account of race or for the purpose of creating a racial balance in the schools in *North Carolina Bd. of Educ. v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971).[6] There, the Court reiterated that

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[5]Judge Voorhees' Finding of Fact No. 7.28 was that "the Seattle School District has traditionally adhered to a policy of the assignment of children to their neighborhood schools." 473 F.Supp. at 1009.

[6]The anti busing law, the Court said, was invalid because it "would inescapably operate to obstruct the remedies granted by the District Court" to eliminate the existing dual school system created by an unconstitutional background of *de jure* segregation. 402 U.S. at 45, 91 S.Ct. at 1285.

> as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable *quite apart from any constitutional requirements.* * * * [I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall * * *.

Id. at 45, 91 S.Ct. at 1285 (emphasis added).

That the Seattle Plan was self-imposed and not required as a remedial measure by a federal district court[7] does not alter or enhance the significance of Washington State's interest in mandating a state-wide neighborhood school policy.[8] As the three-judge panel observed in *Lee v. Nyquist*, a finding of *de jure* segregation is irrelevant when majoritarian political processes are used to frustrate minority participation:

In *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974), the Supreme Court emphasized the importance of local control over education. Local autonomy and diversity are so important to public education, the Court held in *Milliken*, that judicial desegregation remedies could not exceed the geographical scope of the constitutional violation:

> [T]he notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. *No single tradition in public education is more deeply rooted than local control over the operation of schools*; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. * * * Thus, in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 50, 93 S.Ct. 1278, 1305, 36 L.Ed.2d 16 (1973), we observed that local control over the educational process affords citizens an opportunity to participate in decision making, permits the structuring of school programs to fit local needs, and encourages "experimentation, innovation, and a healthy competition for educational excellence."

418 U.S. at 741-42, 94 S.Ct. at 3125 (citations omitted) (emphasis added). *See also Wright v. Council of City of Emporia*, 407 U.S. 451, 469, 92 S.Ct. 2196, 2206, 33 L.Ed.2d 51 (1972) ("Direct control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society * * *."); *Brown v. Bd. of Educ.*, 349 U.S. 294, 299, 75 S.Ct. 753, 755, 99 L.Ed. 1083 (1955) (*Brown II*) (school authorities "have the primary responsibility for elucidating, assessing, and solving" varied local school problems engendered by race); *Martin v. Charlotte Mecklenburg Bd. of Educ.*, 626 F.2d 1165, 1167 (4th Cir. 1980); note 9 *infra*.

[7]The District Court did not reach the question of whether the school districts were under a constitutional duty to desegregate. The District

> The statute places *burdens* on the implementation of educational policies designed to deal with race on the local level.
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> * * * * *
>
> * * * The * * * Legislature has acted to make it more difficult for racial minorities to achieve goals that are in their interest.
>
> The statute thus operates to disadvantage a minority, a racial minority, in the political process. There can be no sufficient justification supporting the necessity of such a course of action.

318 F.Supp. at 719-20. *See also Flores v. Pierce*, 617 F.2d 1386, 1391 (9th Cir. 1980).

The State's argument that *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 413-14, 97 S.Ct. 2766, 2772, 53 L.Ed.2d 851 (1977) (*Dayton I*), permits official rescission

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Court bifurcated the litigation, and the intervenors' claims that the school districts operate unconstitutional dual school systems were not addressed in Stage 1.

[9]Had a successor school board to the one that adopted the Seattle Plan instead of the state electorate as a whole attempted to repeal or rescind the self imposed student assignment plan, we would be faced with a quite different issue. In *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 413-14, 97 S.Ct. 2766, 2772, 53 L.Ed.2d 851 (1977) (*Dayton I*), the Court discussed a school board's rescission of a previously adopted resolution which it was under no constitutional duty to promulgate affecting the assignment of pupils:

> The Board had not acted to undo operative regulations affecting the assignment of pupils or other aspects of the management of school affairs, cf. *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967), but simply repudiated a resolution of a predecessor Board stating that it recognized its own fault in not taking affirmative action at an earlier date. We agree with the Court of Appeals' treatment of this action, wherein that court said:
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> > The question of whether a rescission of previous Board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action it initially took. * * * If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation.

(*Quoting Brinkman v. Gilligan*, 503 F.2d 684, 697 (6th Cir. 1974) (citations omitted)). *Accord, Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 531 n.5, 99 S.Ct. 2971, 2976 n.5, 61 L.Ed.2d 720 (1979) (*Dayton II*). Under this standard, the constitutionality of Initiative 350 would hinge on the Stage II determination of whether the Seattle School District has maintained a dual system or practiced *de jure* segregation.

of previously adopted desegregation measures as long a there was no antecedent constitutional duty to remedy *de jure* segregation ignores the crucial fact that a different governmental body—the state-wide electorate—rescinded a policy voluntarily enacted by locally elected school boards already subject to local political control. Initiative 350, unlike the situation in *Dayton I*, results in the political process being skewed at the expense of local representative bodies and their constituencies. *See* note 8, *supra*.

The opponents of desegregation who reside in the Seattle School District resorted to the state-wide initiative mechanism only after unsuccessful attempts to recall four elected school board members in 1971-72, *see* Finding of Fact No. 6.3, 473 F.Supp. at 1006, and to block the Seattle Plan in the courts, *see* Findings of Fact Nos. 7.1, 7.2, and 7.11, 473 F.Supp. at 1007-08. The effect of Initiative 350 is to restructure the state's political and administrative process so as to *remove* from local school boards their existing authority, and in large part their capability,[9] to enact programs designed to desegregate the schools. Initiative 350 effectively disenfranchises the voters of the local school districts with respect to local educational matters. The interest of the State of Washington in mandating a state-wide policy of neighborhood schools must, in these circumstances, fall to the paramount interest of the locally elected school boards and the community they represent in promulgating their own educational policy. Therefore, we hold that Initiative 350, which attempts to wrest from local control the formulation and implementation of educational and desegregation policies, is not supported by any compelling state interest; consequently, the statute is unconstitutional as a violation of the equal protection clause of the Fourteenth Amendment.[10] *See Hunter v.*

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[9]Judge Voorhees' Finding of Fact No. 8.5 was that "[i]t would be impossible to effect a racial balance of Seattle schools without resort to some or all of the tools or methods prohibited by Section 3 of Initiative 350", 473 F.Supp. at 1010. This holding is not clearly erroneous. Fed.R.Civ.P. 52(a).

[10]*Cf. Associated Gen. Contractors v. San Francisco Unified School Dist.*, 616 F.2d 1381, 1388-90 (9th Cir. 1980), *cert. denied sub nom.*

Erickson, 393 U.S. at 393, 89 S.Ct. at 561 ("the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size."); *Lee v. Nyquist*, 318 F.Supp. at 720.

The appellants contend that *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir. 1980) should control the outcome here. We disagree. In *Brown*, the D.C. Circuit upheld the constitutionality of a series of amendments to congressional appropriations bills which prevent the Department of Health, Education, and Welfare from withholding federal funds from school districts which subscribe to a neighborhood school student assignment policy. The Eagleton-Biden amendment, typical of the challenged provisions, provides that

> [n]one of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home [except for a student requiring special education], * * * in order to comply with Title VI of the Civil Rights Act of 1964.

Quoted in Brown v. Califano, 627 F.2d at 1226 n.26.

Brown is distinguishable in a number of fundamental respects. Although the statutory language of Initiative 350 and the Eagleton-Biden amendment are superficially similar, the operative and intended effects of the statutes are vastly different. The Title VI amendments were merely an internal administrative housekeeping measure designed to limit HEW's ability to order mandatory busing. The legislative history indicates that Congress simply intended to prevent the HEW bureaucracy from acting solely on its own authority in administrative proceedings to coerce local school districts into adopting busing plans. "An explicit,

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National Ass'n of Minority Contractors v. Associated Gen. Contractors, ___ U.S. ___, 101 S.Ct. 783, 66 L.Ed.2d 603 (1980) (state's interest in lowest-bid contracting policy governing *employment* in publicly funded construction projects is paramount to school board's *non-educational* interest in voluntarily adopting a minority set-aside affirmative action program).

major purpose of the amendments was to take 'HEW out of the busing business.' In other words, Congress wanted to ensure that mandatory busing orders derive either from local school officials or federal courts." *Id.* at 1231, *quoting* 122 Cong.Rec. 21198 (1976) (remarks of Sen. Biden) (footnotes omitted). Judge Bazelon noted that:

> the instant case does not *involve a flat prohibition against involuntary busing.* The amendments challenged here merely restrict one federal agency's ability to induce busing as a condition of receiving federal funds. *Local school officials still may voluntarily employ transportation to desegregate * * *. [A]ll reasonable desegregation methods remain available to school officials and to courts.*

627 F.2d at 1229 (emphasis added) (footnote omitted).

Here, Initiative 350 flatly prohibits local officials from busing beyond neighborhood schools if the purpose is to desegregate the schools. Busing beyond neighborhood schools for all other significant reasons is permitted. This is significantly different from the amendments, which the *Brown* court concluded did not "make [a] classification along impermissible [racial] lines." *Id.* at 1230. Because Initiative 350 *does* preclude local school authorities from voluntarily busing to achieve desegregation, and does so via a statute that embodies a burdensome racial classification, *Brown v. Califano* is inapposite.

Therefore, for the reasons stated herein, the judgment of the District Court that Initiative 350 is unconstitutional is affirmed.

II. *Attorney's Fees—The Cross-Appeal*

After the decision on the merits, the appellees requested attorney's fees as authorized by two statutes. The Civil Rights Attorney's Fees Award Act of 1976 provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title * * * or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of * * * title VI of the Civil Rights Act of 1964, the court, *in its discretion,* may

> allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1988 (1980) (emphasis added). Section 718 of the Emergency School Aid Act also provides that:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this subchapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, *in its discretion*, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs.

20 U.S.C. § 3205 (1980) (emphasis added). The District Court denied the motions, and appellees cross-appealed for review of that judgment.

The general attorney's fees statute, § 1988, and the statute dealing specifically with school desegregation cases, § 3205, share the same language and are to be construed together. *Wheeler v. Durham City Bd. of Educ.*, 585 F.2d 618, 621-22 (4th Cir. 1978); *see Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 93 S.Ct. 2201, 37 L.Ed.2d 48 (1973) (per curiam). The Supreme Court has interpreted these statutes as requiring that "the successful plaintiff 'should ordinarily recover an attorney's fee *unless* special circumstances would render such an award *unjust*.' " *Northcross v. Memphis Bd. of Educ.*, 412 U.S. at 428, 93 S.Ct. at 2202, *quoting Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968). Our Court has examined two factors in determining if a case involves "special circumstances" which would make an award "unjust": (1) whether allowing attorney's fees in a particular case would further the congressional purpose in adopting the Acts, and (2) the balance of equities. *See Dennis v. Chang*, 611 F.2d 1302 (9th Cir. 1980); *Aho v. Clark*, 608 F.2d 365 (9th Cir. 1979); *Buxton v. Patel*, 595 F.2d 1182 (9th Cir. 1979).

The congressional purpose in providing attorney's fees in civil rights cases was to eliminate financial barriers to the vindication of constitutional rights and to stimulate voluntary compliance with the law. S. Rep. No. 1011, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News, p. 5908; H.R. Rep. No. 1558, 94th Cong., 2d Sess. (1976).

The District Court concluded that an award of attorney's fees in this case was not necessary because the school districts are publicly-funded entities. There is nothing in the language or legislative history of the statutes, however, indicating a congressional intent to limit attorney's fees to private parties. As long as a publicly-funded organization advances important constitutional values, it is eligible for fees under the statutes. *Dennis v. Chang*, 611 F.2d at 1304-07; *Oldham v. Ehrlich*, 617 F.2d 163, 168-69 (8th Cir. 1980); *Palmigiano v. Garrahy*, 616 F.2d 598, 600-03 (1st Cir. 1980). *See Holley v. Lavine*, 605 F.2d 638 (2d Cir. 1979), *cert. denied sub nom. Blum v. Holley*, 446 U.S. 913, 100 S.Ct. 1843, 64 L.Ed.2d 266 (1980); *Weisenberg v. Huecker*, 593 F.2d 49 (6th Cir.), *cert. denied*, 444 U.S. 880, 100 S.Ct. 170, 62 L.Ed.2d 110 (1979); *Lund v. Affleck*, 587 F.2d 75 (1st Cir. 1978) (allowing awards to publicly-funded legal services corporations).

The State argues that even if a publicly-funded entity is eligible to receive legal fees under the statutes, an award would be inappropriate in this case because the "special circumstance" of an absence of bad faith on the part of the state officials makes an award in this case "unjust." While absence of bad motives precludes an award against named defendants in their individual capacities, *Hutto v. Finney*, 437 U.S. 678-700, 98 S.Ct. 2565, 2574-78, 57 L.Ed.2d 522 (1978), it does not bar an award against the state or named individuals in their official capacities. *Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980); *Universal Amusement Co. v. Hofheinz*, 616 F.2d 202, 204 n.1 (5th Cir. 1980); *Internal Oceanic Enterprises, Inc. v. Menton*, 614 F.2d 502, 504 (5th Cir. 1980); *Johnson v. State of Mississippi*, 606 F.2d 635, 637 (5th Cir. 1979); *Haycraft v. Hollenbach*, 606 F.2d 128, 132 (6th Cir. 1979).

After full consideration of the facts in this case, we

conclude that the District Court abused its discretion in denying the school districts' motion for attorney's fees. The judgment on this issue is reversed and the cause remanded for the purpose of determining the amount of the award.

The District Court also denied intervening appellees' separate motion for attorney's fees, not, as the State suggests, because intervenors could not be included in the statutory category of "prevailing parties," but rather because they played a *de minimis* role in the trial on the merits. After examining the record, we conclude that the District Court was within its discretion in denying intervenors' motion inasmuch as the request was conditioned on their level of participation in the Phase I litigation. Intervenors, however, also necessarily devoted substantial time and effort to preparation for trial on the Phase II issues. This pre-trial preparation was essential because it was apparent from the onset of this case that the school districts would not be in a position to argue they were operating dual school systems if Initiative 350 were found to be constitutional. The burden of litigating the Phase II issues would have been the sole reponsibility of the intervenors.

An award of attorney's fees for time spent on a particular issue is not precluded merely because developments in the course of the litigation make it unnecessary to consider that specific question. "Nothing in the language of § 1988 conditions the District Court's power to award fees on full litigation of the issues. * * *" *Maher v. Gagne*, ___ U.S. ___, ___, 100 S.Ct. 2570, 2575, 65 L.Ed.2d 653 (1980). *Accord, Williams v. Alioto*, 625 F.2d at 848. The legislative policy of encouraging constitutional litigation, which led Congress to specify that an award is permissible for an issue which is not fully litigated if constitutional rights are vindicated through the mechanism of a consent decree or other preliminary relief, S. Rep. No. 1011 at 5, [1976] U.S. Code Cong. & Ad. News at 5912-13, also supports an award for expenses incurred in the preparation of issues which were not reached if the same constitutional values are advanced through resolution of another claim. *See Northcross v. Board of Educ. of Memphis*, 611 F.2d

624, 635-36 (6th Cir. 1979), *cert. denied*, ___ U.S. ___, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980); *Brown v. Bathke*, 588 F.2d 634, 637-38 (8th Cir. 1978); *Busche v. Burkee*, 483 F.Supp. 1326, 1328 (E.D. Wis. 1980). In the analogous situation in which resolution of a non-fee claim makes consideration of a fee claim unnecessary, the court in its discretion may allow an award. *Maher v. Gagne*, 100 S.Ct. at 2576 & n.15; *Oldham v. Ehrlich*, 617 F.2d at 168; *Kimbrough v. Arkansas Activities Ass'n*, 574 F.2d 423, 426-27 (8th Cir. 1978).

School desegregation cases invariably involve multiple parties and multiple issues. It is usually impossible to determine in advance of trial which issues will be reached or which parties will play pivotal roles in the course of the litigation. To retrospectively deny attorney's fees because an issue is not considered or because a party's participation proves unnecessary would have the effect of discouraging the intervention of what in future cases may be essential parties. "The complex nature of school desegregation cases requires that attorneys' fees be approached with flexibility if Congress' goal in enacting these statutes is to be realized." *United States v. Waterbury Bd. of Educ.*, 605 F.2d 573, 576 (2d Cir. 1979).

In this case there was a substantial likelihood that Initiative 350 would be held constitutional. In that event the considerable burden of litigating whether the school districts involved were unconstitutionally segregated would have fallen squarely on the intervenors. Because an award of attorney's fees in this case is essential to effectuate the congressional purpose of encouraging future constitutional litigation in similar circumstances, we conclude that the District Court abused it discretion in denying intervenors' attorney's fees.

The judgment on this issue is reversed and upon remand, the District Court will determine the amount of the award. The award should include not only compensation for time spent on the Phase II issues, but at least some award for time spent monitoring the Phase I litigation. The intervenors could not have effectively litigated Phase II issues if they had not had at least some

familiarity with the proceedings on Phase I issues.

Affirmed in part; reversed and remanded in part.

EUGENE A. WRIGHT, Circuit Judge, dissenting:

The issue in this appeal is whether Initiative 350 violates the Fourteenth Amendment. The initiative was adopted overwhelmingly, passing in each of the 39 counties, and had a statewide affirmative vote in excess of 65%. By enacting the law, Washington's voters chose to adopt a neighborhood schools policy, and to limit the use of mandatory busing as a means of desegregating schools.

It is not our function to assess the wisdom of that choice. We must decide only whether the choice was constitutionally permissible.

We need not determine at this stage of the litigation whether Seattle or any Washington school district operates or maintains a *de jure* segregated school system. The initiative expressly refrains from interfering with constitutionally mandated remedial actions. To date, no court has said that any Washington district operates a dual system.

In the absence of a duty to desegregate, I find no constitutional barrier to the voters' adoption of a neighborhood schools policy. Although the choice made by the voters may have been controversial, it was not one they were precluded from making.

The district court held Initiative 350 unconstitutional on three alternative grounds. The majority, adopting one of the district court's arguments, holds that, because the initiative contains a racial classification which is not necessary to achieve a compelling state interest, it is unconstitutional. After considering the majority's analysis, I shall add my views as to the other two grounds articulated by the district court.

I

The majority finds a racial classification in Initiative 350 because it prohibits student assignments beyond the next nearest school in order to obtain racially balanced schools, but allows such assignments for other reasons. It relies on *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21

L.Ed.2d 616 (1969), and *Lee v. Nyquist*, 318 F.Supp. 710 (W.D. N.Y. 1970), *aff'd*, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971), for the proposition that the state creates an "explicit racial classification" insofar as it "differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." Maj. op. at 1344.

Finding a racial classification, the majority perceives no need to inquire into the purpose or intent behind Initiative 350. Instead, it proceeds immediately to the question whether the classification is necessary to achieve a compelling state interest.

Although recognizing a state interest in a neighborhood schools policy, the majority finds that interest subordinate to the interest of local communities in promulgating their own educational policies for public schools. It concludes the state's interest in neighborhood schools is not compelling and thus the initiative is unconstitutional.

A

In its recent decisions, the Supreme Court has emphasized that the touchstone of an equal protection violation is an intent to discriminate, *i.e.*, an intent to treat similarly situated persons differently.

In *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), the Court affirmed the central purpose of the equal protection clause is to prevent discrimination based on race. *Id.* at 239, 96 S.Ct. at 2047. It emphasized, however, that "a racially discriminatory purpose" was an essential element of an equal protection violation. *Id.* The Court specifically noted the application of this principle in school desegregation cases:

> The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominantly black and predominantly white schools in a community is not alone violative of the Equal Protection Clause. The essential element of *de jure* segregation is "a current

> condition of segregation resulting from intentional state action."

Id. at 240, 96 S.Ct. at 2047.

In the following term, the Court reiterated: "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977). In its most recent school desegregation cases, the Court has adhered to this principle. *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 97 S.Ct. 2166, 53 L.Ed.2d 851 (1979); *Columbus Board of Education v. Penick*, 443 U.S. 449, 99 S.Ct. 2941, 61 L.Ed.2d 666 (1979).

The inquiry into intent can be avoided only if the challenged statute contains an explicit suspect classification:

> Certain classifications, * * * in themselves supply a reason to infer antipathy. Race is the paradigm. A racial classification regardless of purported motivation, is presumptively invalid and can be upheld only upon extraordinary justification. * * * This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. * * * But, as was made clear in *Washington v. Davis* * * * and *Arlington Heights* * * *, even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose.

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272, 99 S.Ct. 2282, 2292, 60 L.Ed.2d 870 (1979) (citations omitted).

My disagreement with the majority is that I do not believe Initiative 350 contains a racial classification. Rather, the initiative is a neutral law that must be analyzed in terms of its intent.

B

Initiative 350 does not treat persons differently on the basis of race. It does treat student assignments designed to obtain racially balanced schools differently than student

assignments for other purposes. In my view that is not a suspect racial classification.

The policy question, whether student assignments beyond the next nearest school should be used to overcome *de facto* segregation, is at the heart of the choice Initiative 350 presented to the voters. That question has little to do with the question whether such assignments should be permitted for purposes of special education or to avoid health and safety hazards.

Clearly, the problems of racial segregation and inequality are central to the former question. Mr. Justice Powell has noted the intensified debate over the educational benefits of integration. He has suggested the indisputable benefits of having young persons attend schools with diverse student bodies "often will be compromised where the methods employed to promote integration include coercive measures such as forced transportation to achieve some theoretically desirable racial balance." *Columbus Board of Education v. Penick*, 443 U.S. 449, 485, n.5, 99 S.Ct. 2941, 2991 n.5, 61 L.Ed.2d 666 (1979) (Powell, J., dissenting). *See Estes v. Metropolitan Branches of Dallas, NAACP*, 444 U.S. 437, 100 S.Ct. 716, 717, 62 L.Ed.2d 626 (1980) (Powell, J.) (dissent from denial of certiorari).

The Justice's comments suggest the nature of the question presented to the voters. There is no classification on the basis of race in resolving that question in favor of neighborhood schools, while permitting distant assignments for other purposes.

Moreover, the majority recognizes, as was found by the district court, that the legislative purpose of Initiative 350 was to adopt a neighborhood schools policy. We held recently that a neighborhood schools policy is not constitutionally suspect. *Diaz v. San Jose Unified School District*, 612 F.2d 411, 415 (9th Cir. 1979). It is inconsistent to hold now that the adoption of such a policy creates a suspect racial classification.[1]

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[1]The majority's reliance on *North Carolina Board of Education v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971), is misplaced. The majority suggests the Supreme Court held a state anti-busing

That holding is also inconsistent with the Supreme Court's school desegregation cases. The laborious inquiry into intent, *see Columbus* and *Dayton*, *supra*, could be avoided under the majority's analysis, by simply finding an explicit racial classification any time a school district bused students for special education or other reasons, while refusing to do so to desegregate its schools.

C

The majority's analysis ultimately turns on Initiative 350 being a statewide initiative. It states this is the "crucial fact," and suggests a different result had the neighborhood schools policy been adopted by local school boards. Maj. op. at 1345-1346 n.8. Indeed, it is clear that the Seattle School District could rescind the Seattle Plan without violating the Fourteenth Amendment. *See Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413-14, 97 S.Ct. 2766, 2772, 53 L.Ed.2d 851 (1977).

It is not clear how the exercise of state power creates a racial classification here. The history of governmental attempts to deal with racial discrimination is replete with federal and state laws directing subordinate governmental entities not to take certain actions on the basis of race. Those laws do not contain explicit racial classifications. By addressing a problem involving a racial minority, the state does not create *ipso facto* a racial classification.

Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969), does not support the majority's analysis. The Akron City Council had enacted a fair housing ordinance. The citizens of Akron subsequently by amendment to the city charter required any ordinance regulating the use or sale of real property on the basis of race to be approved by the voters before becoming effective. The amendment applied to the fair housing ordinance.

The Court did not hold that the repeal of the existing ordinance violated the Fourteenth Amendment. 393 U.S. at

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statute unconstitutional because it interfered with the discretion of school districts to adopt desegregation programs that are not constitutionally required. The opinion held the statute unconstitutional because of its interference with *constitutionally required* remedies.

390, n.5, 89 S.Ct. at 560, n.5. It held the charter amendment violated the equal protection clause because it subjected ordinances aimed at eliminating racial discrimination in housing to a more burdensome legislative process than other ordinances.

Initiative 350 in no way alters the legislative process in the State of Washington. It does not subject legislation sought by racial or other minorities to procedures more burdensome than those applicable to other legislation.

The difficulty with the majority's analysis, supported in part by dictum in *Lee v. Nyquist*, 318 F.Supp. 710 (W.D.N.Y. 1970), *aff'd*, 402 U.S. 935, 91 S.Ct. 1618, 29 L.Ed.2d 105 (1971),[2] is that it confuses treatment of racial problems with treatment on the basis of race. The latter, of course, is suspect. But "racial" problems, such as school desegregation, must be dealt with in terms of the specific problem and specific solutions. The state does not create a classification on the basis of race in so doing.

D

Initiative 350 is an exercise of the state's constitutional responsibilities in the field of public education.[3] The state constitution decrees that it is "the paramount duty of *the state* to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste or sex." Wash. Const. Art. IX, § 1 (emphasis added). "The *legislature* shall provide for a general and uniform system of public schools." Art. IX, § 2 (emphasis added). *See Seattle School District v. State*, 90 Wash.2d 476, 518, 585 P.2d 71, 95 (1978) (state legislature has responsibility for organization, administration and operational details of elementary and secondary education).

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[2]*Lee*, like *Hunter*, involved a statute which differentiated the way in which measures were enacted depending on their content; the procedures for enacting measures benefiting a racial minority were more burdensome.

[3]The state constitution vests legislative authority in the legislature, but reserves to the people the power to enact bills independent of the legislature. Wash. Const. Art. II, § 3. An initiative, then, is an exercise of

In *Mandatory Busing v. Palmason*, 80 Wash.2d 445, 495 P.2d 657 (1972), the Washington Supreme Court considered a challenge to a desegregation plan adopted by the Seattle School District and approved by the State Superintendent of Public Instruction. The court stated that a local initiative could not be used to overturn the plan:

> Initiative and referendum procedures can be invoked at the local level only if their exercise is not in conflict with state law. * * * Clearly they cannot be used to interfere in the management of *the state's school system.*

80 Wash.2d at 450, 495 P.2d at 661 (emphasis added) (citation omitted). It is ironic that a federal court would now hold that the state itself may not interfere in its own school system.

The majority's claim that "Initiative 350 effectively disenfranchises the voters of the local school districts" ignores the district court's finding that 60% of the voters in Seattle voted in favor of the initiative. In any case, a statewide, rather than local, initiative was required by *Palmason*. Its use does not, in my view, create an explicit racial classification.

II

The district court's second argument was that discriminatory intent was a motivating factor in the adoption of Initiative 350.

Proof of discriminatory intent must be gleaned from objective factors, several of which were outlined in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-68, 97 S.Ct. 555, 563-65, 50 L.Ed.2d 450 (1977): (1) discriminatory impact; (2) historical background; (3) specific sequence of events culminating in the decision; (4) departures from the normal procedural and substantive sequence; and (5) legislative and administrative history.

The burden is on the party challenging a statute to

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the state's legislative power. *See Love v. King County*, 181 Wash. 462, 469, 44 P.2d 175, 178 (1935) (passage of initiative is an exercise of same power of sovereignty as passage of a statute by the legislature).

prove that discriminatory intent was a motivating factor in its adoption. *Id.* at 265, 270, 97 S.Ct. at 563, 566.

The district court did find that "racial bias or racial motivation is a factor in the opposition to the 'busing' of students to attain racial balance." Finding of Fact 3.7. A two-fold response to this purported finding is necessary. First, there is insufficient evidence in the present record to support a finding of racial bias as to Initiative 350 under the standards developed by the Supreme Court. Second, any ultimate determination as to the presence or absence of discriminatory intent is a highly mixed question of law and fact, reviewable on appeal.

The district court based its finding of discriminatory intent on three factors. First, it found the effect of Initiative 350 would be racially imbalanced schools in Seattle, Tacoma, and Pasco. It found there would be a disproportionate adverse impact on minority students as a result of that imbalance. *See* Finding of Fact 3.1(a).

Second, it examined the historical background and sequence of events leading to the adoption of the initiative, and concluded it was intended to prevent implementation of the Seattle Plan (*i.e.*, racial balancing of Seattle schools by means of mandatory busing). For example, the court pointed to an unsuccessful recall election designed to remove members of the Seattle Board of Education who supported mandatory busing.

Third, the court considered Initiative 350 to be a marked departure from the "procedural norm," in that a local decision was overridden in a statewide initiative.

These factors do not support the district court's conclusion that a discriminatory intent was a motivating factor behind adoption of Initiative 350.

A

The underlying sociological and political assumptions equating quality education with integration have been questioned. *See* N. St. John, *School Desegregation Outcomes for Children* 136 (1975).[4] To the extent the district

[4]*See* Bell, *Book Review*, 92 Harv.L.Rev. 1826 (1979), and studies reviewed therein. *See also* D. Armor, *The Evidence on Busing*, 28 Pub.

court found the disproportionate adverse impact of Initiative 350 on minority students to be a "certainty," *see* 473 F.Supp. at 1015, its finding was clearly erroneous.

Moreover, the Supreme Court has consistently disavowed the proposition that foreseeable impact alone is adequate to prove intent. Additional indicia of discriminatory intent are required. *See Keyes v. School Dist. No. 1, Denver*, 413 U.S. 189, 208, 93 S.Ct. 2686, 2697, 37 L.Ed.2d 548 (1973); *Columbus Board of Education v. Penick*, 443 U.S. at 464, 99 S.Ct. at 2950 (disparate impact and foreseeable consequences, without more, do not establish a constitutional violation). Discriminatory purpose "implies the decisionmaker * * * selected or reaffirmed a particular course of action at least in part *'because of,' not merely 'in spite of,'* its adverse effects upon an identifiable group." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. at 279, 99 S.Ct. at 2296 (emphasis added).

B

The historical events cited by the district court are not probative of discriminatory purpose. Assuming that Initiative 350 was prompted by opposition to the Seattle Plan, there is no evidence in the record indicating that opposition to the Seattle Plan was in turn motivated by discriminatory intent. Indeed the district court specifically found that the backers of the initiative acted responsibly in their advocacy of the initiative and did not direct appeals to the racial biases of voters. Finding of Fact 7.27.

Accepting the findings that opposition to the Seattle Plan was the primary motivation behind Initiative 350, the record is devoid of evidence to conradict the state's contention that historical opposition to the Seattle Plan was motivated by race-neutral concerns. *See* Findings of Fact 7.30, 7.31, and 7.32. Absent this second linkage, the cited historical and sequential events are simply not probative in establishing discriminatory purpose in the subsequent enactment of Initiative 350.

Interest 90 (1972). *Cf.* J. Coleman, S. Kelly & J. Moore, *Trends in School Segregation*, 1968-73 (1975) (concluding school desegregation a significant cause of white flight).

C

The concept of a procedural departure from the norm has not been clearly defined. No argument is advanced, however, that the proponents of Initiative 350 failed to follow proper administrative or statutory procedures for its enactment.

Washington voters have utilized the initiative and referendum devices extensively in recent years. *See* Comment, *Judicial Review of Laws Enacted by Popular Vote,* 55 Wash.L.Rev. 175, 179, n.29 (1979). Any procedural departure from the norm is of minimal probative value here, since it was required by a decision of the state supreme court. *See* §§ I-C & I-D, *supra.*

At best, the court is left with an inference of intent solely from foreseeable impact. While disproportionate impact on a racial minority may be highly probative of discriminatory intent, it is not a conclusive evidentiary factor. *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. at 278, 99 S.Ct. at 2295. Plaintiffs have failed to sustain their burden of proof on this issue. The factual findings on intent do not establish that support for Initiative 350 or opposition to the Seattle Plan was motivated by discriminatory intent.[4A]

III

Borrowing from an analytical structure developed in the area of First Amendment rights, the district court invalidated Initiative 350 for overbreadth. I disagree.

The doctrinal basis of the court's conclusion is ill-defined. Traditionally, the overbreadth doctrine is applied when a possibility exists that a constitutionally protected activity may be "chilled". *See NAACP v. Button,* 371 U.S. 415, 432-33, 83 S.Ct. 328, 337-38, 9 L.Ed.2d 405 (1963) (enforcement of barratry law may be invalid if it prohibits exercise of First Amendment rights). It is a departure from the normal mode of constitutional adjudication, justified by the favored status of First Amendment rights to free

[4A] *See* Note, 55 Wash.L.Rev. 735 (1980) (concluding district court's opinion unsound in its inference of discriminatory intent solely from the decision to maintain a neighborhood schools policy).

expression and association. *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 60 S.Ct. 736, 741-42, 84 L.Ed. 1093 (1940).

Variants or analogues of overbreadth scrutiny rarely have arisen in the adjudication of other preferred claims. *Compare Aptheker v. Secretary of State*, 378 U.S. 500, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964) (applying overbreadth doctrine and finding burden on Fifth Amendment right to travel) *with United States v. Robel*, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967) (invalidating section of same act for First Amendment overbreadth).[5] Courts have developed different methods of strict review to protect other preferred interests. *See generally* Comment, *The First Amendment Overbreadth Doctrine*, 83 Harv.L.Rev. 844, 852 (1970). Although similarities exist between equal protection scrutiny and the overbreadth doctrine, the latter should not supplant or supplement the former in its area of application.

Under equal protection analysis, labeling a classification as over-inclusive does not determine its compatibility *vel non* with the equal protection clause. Under- and over-inclusiveness must be viewed with reference to the means-end relationship. *Eisenstadt v. Baird*, 405 U.S. 438, 447-54, 92 S.Ct. 1029, 1035-38, 31 L.Ed.2d 349 (1972).

Appellees do not assert that the initiative impermissibly restricts First Amendment rights. Rather, they assert that is restricts a constitutional duty under the Fourteenth Amendment.

They cannot assert, however, that an affirmative duty makes their current desegregation plans constitutionally necessary, as there has been no determination, judicial or otherwise, of *de jure* segregation. It is their position that Initiative 350 could operate to inhibit or prevent busing remedies to remedy constitutional violations.

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[5]The Court in *United States v. Robel* declined to address Fifth Amendment arguments. 389 U.S. 258, 261, n.5, 88 S.Ct. 419, 422, n.5, 19 L.Ed.2d 508 (1967). It noted that *Aptheker v. Secretary of State* had been decided under the Fifth Amendment. 389 U.S. at 263, 88 S.Ct. at 423. *See also Aptheker v. Secretary of State*, 378 F.2d 500, 521 (Clark, J., dissenting) (distinguishing *Thornhill v. Alabama* and *NAACP v. Button* as First Amendment cases).

The record indicates that the framers and enforcers of Initiative 350 intended that it not interfere with a constitutional duty. This is reinforced by the language of the enactment itself. Section 6 provides:

> This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to public schools.

It is axiomatic that courts should endeavor to construe statutes in a constitutionally permissible manner. *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 571, 93 S.Ct. 2880, 2893, 37 L.Ed.2d 796 (1973) (stating that court should not "destroy" a statute but should construe it to comport with constitutional limitations); *Lynch v. Overholser*, 369 U.S. 705, 710-11, 82 S.Ct. 1063, 1067, 8 L.Ed.2d 211 (1962) (interpreting statute to "free" it from constitutional doubts). Facial invalidation for overbreadth is an "extreme" remedy to be avoided if a constitutional construction is possible.

It is not only possible but expressly required that Initiative 350 be construed as not restricting a school district's performance of a constitutional duty to desegregate. The measure is not an "absolute prohibition" against student assignments for racial balance that would "inescapably operate to obstruct" federal court remedies. *See North Carolina State Board of Education v. Swann*, 402 U.S. 43, 45-46, 91 S.Ct. 1284, 1285-86, 28 L.Ed.2d 586 (1971).

The statute here does not prohibit busing beyond the next nearest school when necessary to fulfill a constitutional duty. Initiative 350 subordinates its neighborhood schools policy to constitutional imperatives.

IV

Initiative 350 presented a sensitive policy issue to the voters. The issue is of special concern to minority groups. Yet absent prior constitutional violations or impermissible motives, I see no reason why the issue should be resolved by federal judges rather than through the legislative process. I would reverse and remand to the district court.

APPENDIX C

[filed August 29, 1979; Clerk's stamp deleted]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. C78-753 V
ORDER

SEATTLE SCHOOL DISTRICT NO. 1 OF KING COUNTY, WASHINGTON, a municipal corporation, et al.,

Plaintiffs,

and

AMERICAN CIVIL LIBERTIES UNION; et al.,

Intervenor Plaintiffs,

and

EAST PASCO NEIGHBORHOOD COUNCIL, et al.,

Additional Intervenor Plaintiffs,

vs.

THE STATE OF WASHINGTON; et al.,

Defendants,

and

CITIZENS FOR VOLUNTARY INTEGRATION COMMITTEE (Ci.V.I.C.); et al.,

Intervenor Defendants.

Having considered the motion of Ci.V.I.C. that the Court make additional findings of fact, and the motions of the plaintiffs and of the plaintiff intervenors for the allowance of attorneys' fees and costs, together with the memoranda and affidavits filed in support thereof and in

opposition thereto, the Court now finds and rules as follows:

1. No memorandum was filed in support of Ci.V.I.C.'s motion that additional findings be made by the Court. The Court finds that good cause has not been shown as to why those additional findings should be made.

2. The allowance of attorneys' fees and costs in actions such as this is made discretionary with the trial court by the applicable statutes authorizing the award of attorneys' fees and costs. 42 U.S.C. § 1988; 20 U.S.C. § 1617.

3. The legislative history of the statutes authorizing the allowance of attorneys' fees and costs in actions such as this makes it clear that the allowance of attorneys' fees and costs was meant to encourage the private enforcement of civil rights and to encourage aggrieved individuals to act as private attorneys general. *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968); *Northcross v. Bd. of Education*, 412 U.S. 427 (1973). In the absence of any provision for the recovery of attorneys' fees and costs, private persons, even though grievously injured in the exercise of their civil rights, would hesitate to embark upon litigation which is almost always long, complex and expensive.

4. In the present case, however, this action was commenced not by private persons whose own civil rights had been violated but rather by three public bodies, the school districts of Seattle, Tacoma and Pasco. The financial concerns of these public bodies are hardly analogous to those of impecunious parents of school children whose civil rights may have been violated. Although the school districts do not have unlimited funds, they do, at least, have available to them public funds with which to prosecute litigation. The plaintiffs are to a very large extent financed by appropriations from the state. In part those appropriations are to defray administrative costs, including the legal expenses, of the plaintiff school districts.

5. With respect to the plaintiff school districts I find in the exercise of the discretion accorded to me by the controlling statutes that the legal expenses of the plaintiffs should not be shifted from them to the defendant state.

6. With respect to claims of the plaintiff intervenors,

this Court was very liberal in granting leave to intervene to those petitioning to do so. In freely granting leave to intervene, the Court considered the assertion by a number of the intervenors that there was *de jure* segregation of the schools of plaintiffs and that even if Initiative 350 were held to be constitutional, the alleged *de jure* segregation would require the intervention of this Court. The Court considered that if it should hold Initiative 350 to be constitutional, the plaintiff school districts could not represent adequately the contentions of those who were asserting *de jure* segregation since it was unlikely that the school districts would concede that there was *de jure* segregation in the schools of the plaintiff districts.

7. The Court finds that counsel for the plaintiffs adequately and ably represented the interests of the plaintiff intervenors with respect to the constitutionality of Initiative 350 and that the result would have been the same had the Court not permitted the intervention of any party prior to its decision as to the constitutionality of the initiative. Involvement of the plaintiff intervenors at this stage of the trial was not necessary to assure a fair and balanced presentation of plaintiffs' case. *Keyes v. School Dist. No. 1*, 439 F.Supp. 393 (D. Colo. 1977).

8. The Court finds that in the exercise of its discretion attorneys' fees and costs should not be awarded to the plaintiff intervenors as against the defandant state. If the judgment of this Court with respect to Initiative 350 should be reversed upon appeal, and if at trial plaintiff intervenors should prevail in their assertion that there is *de jure* segregation in plaintiff school districts, the Court will at that time entertain a motion by the intervenors for the allowance of attorneys' fees and costs.

Accordingly, the motion of defendant intervenor Ci.V.I.C. that the Court make additional findings of fact is DENIED; the motions of the plaintiffs and of the plaintiff intervenors for the allowance of attorneys' fees and costs are DENIED.

The Clerk of this Court is instructed to send uncertified copies of this order to all counsel of record.

DATED this 29th day of August, 1979.

/s/_____
United States District Judge

APPENDIX D

[filed May 18, 1981; Clerk's stamp deleted]

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NOS. 79-4643
79-4655
79-4676
79-4740
79-4801
79-4802

SEATTLE SCHOOL DISTRICT NO. 1 OF KING COUNTY, WASHINGTON, a municipal corporation; TACOMA SCHOOL DISTRICT NO. 10 OF PIERCE COUNTY, WASHINGTON, a municipal corporation; PASCO SCHOOL DISTRICT NO. 1 OF FRANKLIN COUNTY, WASHINGTON, a municipal corporation; BOARD OF DIRECTORS OF SEATTLE SCHOOL DISTRICT NO. 1, the elective governing body of Seattle School District No. 1; PATT SUTTON and JOHN SUTTON, each individually, and PATT SUTTON as Board of Directors member and as guardian ad litem for PHOEBE SUTTON, NICHOLAS SUTTON, JOSHUA SUTTON, and PATRICK SUTTON; RICHARD ALEXANDER and CONSTANCE ALEXANDER, each individually, and RICHARD ALEXANDER, as Board of Directors member and as guardian ad litem for REGINA ALEXANDER; CHERYL BLEAKNEY and THOMAS P. BLEAKNEY, each individually, and CHERYL BLEAKNEY, as Board of Directors member and as guardian ad litem for ROSS BLEAKNEY and SCOTT BLEAKNEY; DON OLSON and FRANCELLA OLSON, each individually, and DON OLSON, as Board of Directors member and as guardian ad litem for PETER OLSON; DOROTHY HOLLINGSWORTH, individually and as Board of Directors member; SUZANNE HITTMAN and DONALD HITTMAN, each individually, and SUZANNE HITTMAN, as Board of Directors member and as guardian ad litem for JOHN HITTMAN; T. J. and LYNDA VASSAR, individually and as parents and guardians ad litem for

MIKELLE VASSAR and ASHA VASSAR; ANNIE JONES, individually and as grandparent and guardian ad litem for CATRINA JONES and RENALDO JONES; HARRIET and WILLIAM WASSERMAN, individually and as parents and guardians ad litem for WAYLAND WASSERMAN and WYETH WASSERMAN; JONIS and CHARLES DAVIS, individually and as parents and guardians ad litem for JEFFREY DAVIS and RACHEL DAVIS; RICHARD L. and BARBARA D. ANDREWS, individually and as parents and guardians ad litem for CARMEN ANDREWS, LISA ANDREWS, and CHEYNEY ANDREWS; ANDRES and EVELYN TANGALIN, individually and as parents and guardians ad litem for MEI LIN TANGALIN, CELINE TANGALIN and MILES TANGALIN; BOB and ANITA SANTOS, individually and as parents and guardians ad litem for JOHN SANTOS and NANCY SANTOS; VIRGINIA and BYRON MARR, individually and as parents and guardians ad litem for ERIC MARR, CURTIS MARR, and PAMELA MARR; JOE and MONA JONES, individually and as parents and guardians ad litem for BRENT JONES and DANA JONES; MARY and JOHN CHARLES, individually and as parents and guardians ad litem for PAMELA CHARLES and ROBERT CHARLES; TAVALE and SARA TAUPULE, individually and as parents and guardians ad litem for SAGA TAUPULE; on behalf of themselves and alternatively on behalf of all citizens of the United States and all residents of the State of Washington who are similarly situated,

Plaintiffs-Appellees,

—VS—

THE STATE OF WASHINGTON; DIXY LEE RAY, Governor of the State of Washington; JOHN BAGNARIOL and JOHN A. CHERBERG, as principal officers of the legislative authority of the State of Washington; SLADE GORTON, Attorney General of the State of Washington; FRANK B. BROUILLET, Washington State Superintendent of Public Instruction; H. EUGENE HALL; LEVY S. JOHNSTON; JACK L. REID; EDWARD DIAMOND; MARK E. HOEHNE; ROGER H. LINCOLN; WALTER H. LEWIS; JAMES M. SPALDING; OLLIE MAE WILSON; ORVILLE BARNES; GRANT L. ANDERSON;

EILEEN B. KALLES; PHILIP B. SWAIN; and ROBERT B. STOOKEY, each as members of the Washington State Board of Education,

Defendants-Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given that the State of Washington and the following state officers [either as heretoforenamed parties or as substituted parties pursuant to FRAP 43(c)]:

John Spellman as Governor of the State of Washington,

William Polk and Jeanette Hayner, as principal officers of the Washington State House of Representatives and Senate, respectively,

Kenneth O. Eikenberry as Attorney General of the State of Washington,

Frank B. Brouillet as Washington State Superintendent of Public Instruction,

H. Eugene Hall, Levy S. Johnston, Dale W. Thompson, Edward Diamond, Mark E. Hoehne, Roger H. Lincoln, Walter H. Lewis, Edward Armbruster, Ollie Mae Wilson, Roy E. Jorgensen, Grant L. Anderson, Robert N. Randall, Philip B. Swain, Margaret R. McCarthy and Lee Bailey as Members of the Washington State Board of Education,

do hereby appeal from the judgment in this case evidenced by the opinion of the Court of Appeals for the Ninth Circuit, originally filed on December 16, 1980, declaring Initiative Measure No. 350 to be unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, said judgment having been finally disposed of by order filed on March 26, 1981, denying Defendant-Appellants' petition for rehearing with suggestion for *en banc* hearing.

* * *

This appeal is taken pursuant to 28 USC § 1254(2).

DATED this 13th day of May, 1981.

KENNETH O. EIKENBERRY,
Attorney General,

MALACHY R. MURPHY,
Deputy Attorney General,

/s/_____

THOMAS F. CARR,
Sr. Assistant Attorney General,
Temple of Justice, AQ-04
Olympia, WA 98504
Telephone: AC 206 753-4556

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NOS. 79-4643
79-4655
79-4676
79-4740
79-4801
79-4802

AFFIDAVIT OF SERVICE
BY MAIL

SEATTLE SCHOOL DISTRICT NO. 1 OF KING COUNTY, WASHINGTON, a municipal corporation; et al.,
Plaintiffs-Appellees,

—VS—

STATE OF WASHINGTON, et al.,
Defendants-Appellants.

STATE OF WASHINGTON)
: ss.
COUNTY OF THURSTON)

I, Linda C. Sandera, being first duly sworn, on oath depose and say: That I am, and at all times hereinafter

mentioned have been, a citizen of the United States, over the age of 18 years, and competent to be a witness in the above entitled case; that on the 14th day of May, 1981, I duly served one copy each of Notice of Appeal to the Supreme Court of the United States upon all counsel of record by enclosing said materials in an envelope addressed as follows:

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Short & Cressman
Attorneys at Law
3000 Seattle-First National Bank Bldg.
Seattle, WA 98154

* * *

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said addresses being the last known post office addresses of counsel of record, by depositing the envelopes in the United States mail with correct first-class postage affixed thereto.

/s/_____
LINDA C. SANDERA

SUBSCRIBED AND SWORN to before me this 14th day of May, 1981.

/s/_____
NOTARY PUBLIC in and for the State of Washington, residing at Olympia

AFF. OF SERVICE
BY MAIL

APPENDIX E

[filed March 26, 1981; Clerk's stamp deleted]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 79-4643
79-4655
79-4676
79-4740
79-4801
79-4802

D.C. No. 78-753

ORDER

SEATTLE SCHOOL DISTRICT No. 1, et al.,

Plaintiffs-Appellees,

v.

THE STATE OF WASHINGTON, et al.,

Defendants-Appellants.

Before: ELY, WRIGHT, and NELSON, Circuit Judges

The judges constituting the panel originally concerned with the subject case (Ely, Wright, and Nelson) have voted unanimously to deny the Petition for Rehearing. Judge Wright has voted to adopt the suggestion for rehearing en banc, Judge Nelson has voted to reject such suggestion, and Judge Ely has recommended that the suggestion for en banc rehearing be rejected.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Petition for Rehearing is denied, and the suggestion for a rehearing en banc is rejected.

APPENDIX F

(CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED)

Constitution of the United States of America

AMENDMENT XIV

§ 1 CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Washington Constitution

ARTICLE IX
EDUCATION

§ 1 PREAMBLE. It is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex.

§ 2 PUBLIC SCHOOL SYSTEM. The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.

Initiative Measure No. 350 (Now codified in the Revised Code of Washington as shown below)

Chapter 28A.26

REQUIRING ATTENDANCE GEOGRAPHICALLY NEAR STUDENT'S RESIDENCE

28A.26.010 General rule——Exceptions. Notwithstanding any other provision of law, after December 7, 1978, no school board, school district, educational service district board, educational service district, or county committee, nor the superintendent of public instruction, nor the state board of education, nor any of their respective employees, agents or delegates shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence within the school district of his or her residence and which offers the course of study pursued by such student, except in the following instances.

(1) If a student requires special education, care or guidance, he may be assigned and transported to the school offering courses and facilities for such special education, care or guidance;

(2) If there are health or safety hazards, either natural or man made, or physical barriers or obstacles, either natural or man made, between the student's place of residence and the nearest or next nearest school; or

(3) If the school nearest or next nearest to his place of residence is unfit or inadequate because of overcrowding, unsafe conditions or lack of physical facilities [1979 c 4 § 1 (Initiative Measure No. 350).]

28A.26.020 Application of next geographically nearest rule. In every such instance where a student is assigned and transported to a school other than the one nearest his place of residence, he shall be assigned and transported to the next geographically nearest school with the necessary and applicable courses and facilities within the school district of his or her residence. [1979 c 4 § 2 (Initiative Measure No. 350).]

28A.26.030 Explanation of phrase as used in RCW 28A.26.010. For purposes of RCW 28A.26.010, "indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence within the school district of his or her residence and which offers the course of study pursued by such student" includes, but is not limited to, implementing, continuing, pursuing, maintaining or operating any plan involving (1) the redefining of attendance zones; (2) feeder schools; (3) the reorganization of the grade structure of the schools; (4) the pairing of schools; (5) the merging of schools; (6) the clustering of schools; or (7) any other combination of grade restructuring, pairing, merging or clustering: *Provided,* That nothing in this chapter shall limit the authority of any school district to close school facilities. [1979 c 4 § 3 (Initiative Measure No. 350).]

28A.26.040 Explanation of "special education, care or guidance" as used in RCW 28A.26.010. For the purposes of RCW 28A.26.010 "special education, care or guidance" includes the education, care, or guidance of students who are physically, mentally or emotionally handicapped. [1979 c 4 § 4 (Initiative Measure No. 350).]

28A.26.050 Voluntary options not precluded. The prohibitions of this chapter shall not preclude the establishment of schools offering specialized or enriched educational programs which students may voluntarily choose to attend, or of any other voluntary option offered to students. [1979 c 4 § 5 (Initiative Measure No. 350).]

28A.26.060 Adjudication of constitutional issues not precluded. This chapter shall not prevent any court of competent jurisdiction from adjudicating constitutional issues relating to the public schools. [1979 c 4 § 6 (Initiative Measure No. 350).]

28A.26.900 Severability——1979 c 4. If any provision of this chapter, or its application to any person or circumstance is held invalid, the remainder of the chapter, or the application of the provision to to other persons or cir-

cumstances is not affected. [1979 c 4 § 8 (Initiative Measure No. 350).]

Equal Educational Opportunities Act of 1974 (20 USC § 1701, et seq.)

EQUAL EDUCATIONAL OPPORTUNITIES

POLICY AND PURPOSE

§ 1701. Declaration of policy

(a) The Congress declares it to be the policy of the United States that—

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this part [20 USCS §§ 1701 et seq.] to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 1, § 202, 88 Stat. 514.)

§ 1702. Findings

(a) The Congress finds that—

(1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

(2) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students;

(3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large

amount of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;

(4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity, is excessive;

(5) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

(b) For the foregoing reasons, it is necessary and proper that the Congress pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provisions of this title [20 USCS §§ 1701 et seq.] are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 1, § 203, 88 Stat. 514.)

UNLAWFUL PRACTICES

§ 1703. Denial of equal educational opportunity prohibited

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—

(a) the deliberate segregation by an educational agency

of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take affirmative steps, consistent with subpart 4 of this title [20 USCS §§ 1712-1718], to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregation of students on the basis of race, color, or national origin among the schools of such agency; or

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 2, § 204, 88 Stat. 515.)

§ 1704. Balance not required

The failure of an educational agency to attain a balance, on the basis of race, color, sex, or national origin, of students among its schools shall not constitute a denial of equal educational opportunity, or equal protection of the laws.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 2, § 205, 88 Stat. 515.)

§ 1705. Assignment on neighborhood basis not a denial of equal educational opportunity

Subject to the other provisions of this part [20 USCS §§ 1701 et seq.], the assignment by an educational agency of a student to the school nearest his place of residence which provides the appropriate grade level and type of education for such student is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating studdents on the basis of race, color, sex, or national origin, or the school to which such student is assigned was located on its site for the purpose of segregating students on such basis.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 2, § 206, 88 Stat. 515.)

§ 1706. Civil actions

An individual denied an equal educational opportunity, as defined by this part [20 USCS §§ 1701 et seq.] may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this title [20 USCS §§ 1701 et seq.] referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 3, § 207, 88 Stat. 516.)

§ 1707. Effect of certain population changes on certain actions

When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a

desegregated school system, such school population changes so occurring shall not, per se, constitute a cause for civil action for a new plan of desegregation or for modification of the court approved plan.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 3, § 208, 88 Stat. 516.)

§ 1708. Jurisdiction of District Courts

The appropriate district court of the United States shall have and exercise jurisdiction of proceedings instituted under section 207 [20 USCS § 1706].

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 3, § 209, 88 Stat. 516.)

§ 1709. Intervention by Attorney General

Whenever a civil action is instituted under section 207 [20 USCS § 1706] by an individual, the Attorney General may intervene in such action upon timely application.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 3, § 210, 88 Stat. 516.)

§ 1710. Suits by the Attorney General

The Attorney General shall not institute a civil action under section 207 [20 USCS § 1706] before he—

(a) gives to the appropriate educational agency notice of the condition or conditions which, in his judgment, constitute a violation of subpart 2 of this part [20 USCS §§ 1703 et seq.]; and

(b) certifies to the appropriate district court of the United States that he is satisfied that such educational agency has not, within a reasonable time after such notice, undertaken appropriate remedial action.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 3, § 211, 88 Stat. 516.)

§ 1712. Formulating remedies—Applicability

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department, or agency of the United States shall seek

or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 4, § 213, 88 Stat. 516.)

§ 1713. Priority of remedies

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or of the first combination thereof which would remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 215 [20 USCS § 1714];

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 215 and 216 of this part [20 USCS §§ 1714 and 1715].

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 4, § 214, 88 Stat. 517.)

§ 1714. Transportation of students

(a) No court, department, or agency of the United States shall, pursuant to section 214 [20 USCS § 1713], order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.

(b) No court, department, or agency of the United States shall require directly or indirectly the transportation of any student if such transportation poses a risk to the health of such student or constitutes a significant impingement on the educational process with respect to such student.

(c) When a court of competent jurisdiction determines that a school system is desegregated, or that it meets the constitutional requirements, or that it is a unitary system, or that it has no vestiges of a dual system, and thereafter residential shifts in population occur which result in school population changes in any school within such a desegregated school system, no educational agency because of such shifts shall be required by any court, department, or agency of the United States to formulate, or implement any new desegregation plan, or modify or implement any modification of the court approved desegregation plan, which would require transportation of students to compensate wholly or in part for such shifts in school population so occurring.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 4, § 215, 88 Stat. 517.)

§ 1715. District lines

In the formulation of remedies under section 213 or 214 of this part [20 USCS § 1712 or § 1713] the lines drawn by a State, subdividing its territory into separate school districts, shall not be ignored or altered except where it is established that the lines were drawn for the purpose, and

had the effect, of segregating children among public schools on the basis of race, color, sex, or national origin.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 4, § 216, 88 Stat. 518.)

§ 1716. Voluntary adoption of remedies

Nothing in this part [20 USCS §§ 1701 et seq.] prohibits an educational agency from proposing, adopting, requiring, or implementing any plan of desegregation, otherwise lawful, that is at variance with the standards set out in this part [20 USCS §§ 1701 et seq.] nor shall any court, department, or agency of the United States be prohibited from approving implementation of a plan which goes beyond what can be required under this part [20 USCS §§ 1701 et seq.], if such plan is voluntarily proposed by the appropriate educational agency.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 4, § 217, 88 Stat. 518.)

§ 1717. Reopening proceedings

A parent or guardian of a child, or parents or guardians of children similarly situated, transported to a public school in accordance with a court order, or an educational agency subject to a court order or a desegregation plan under title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000c et seq.] in effect on the date of the enactment of this part [20 USCS §§ 1701 et seq.] and intended to end segregation of students on the basis of race, color, or national origin, may seek to reopen or intervene in the further implementation of such court order, currently in effect, if the time or distance of travel is so great as to risk the health of the student or significantly impinge on his or her educational process.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 4, § 218, 88 Stat. 518.)

§ 1718. Limitation on orders

Any court order requiring, directly or indirectly, the transportation of students for the purpose of remedying a

denial of the equal protection of the laws may, to the extent of such transportation, be terminated if the court finds the defendant educational agency has satisfied the requirements of the fifth or fourteenth amendments to the Constitution, whichever is applicable, and will continue to be in compliance with the requirements thereof. The court of initial jurisdiction shall state in its order the basis for any decision to terminate an order pursuant to this section, and the termination of any order pursuant to this section shall be stayed pending a final appeal or, in the event no appeal is taken, until the time for any such appeal has expired. No additional order requiring such educational agency to transport students for such purpose shall be entered unless such agency is found not to have satisfied the requirements of the fifth or fourteenth amendments to the Constitution, whichever is applicable.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 4, § 219, 88 Stat. 518.)

§ 1720. Definitions

For the purposes of this part [20 USCS §§ 1701 et seq.]—

(a) The term "educational agency" means a local educational agency or a "State educational agency" as defined by section 801(k) of the Elementary and Secondary Education Act of 1965 [20 USCS § 881(K)].

(b) The term "local educational agency" means a local educational agency as defined by section 801(f) of the Elementary and Secondary Education Act of 1965 [20 USCS § 881(f)].

(c) The term "segregation" means the operation of a school system in which students are wholly or substantially separated among the schools of an educational agency on the basis of race, color, sex, or national origin or within a school on the basis of race, color, or national origin.

(d) The term "desegregation" means desegregation as defined by section 401(b) of the Civil Rights Act of 1964 [42 USCS § 2000c(b)].

(e) An educational agency shall be deemed to transport

a student if any part of the cost of such student's transportation is paid by such agency.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 5, § 221, 88 Stat. 518.)

§ 1721. Separability of provisions

If any provision of this part [20 USCS §§ 1701 et seq.] or of any amendment made by this part [20 USCS § 1608], or the application of any such provision to any person or circumstance, is held invalid, the remainder of the provisions of this part [20 USCS §§ 1701 et seq.] and of the amendments made by this part [20 USCS § 1608] and the application of such provision to other persons or circumstances shall not be affected thereby.

(Aug. 21, 1974, P. L. 93-380, Title II, Part A, Subpart 6, § 223, 88 Stat. 519.)

§ 1751. Prohibition against assignment or transportation of students to overcome racial imbalance

No provision of this Act [20 USCS §§ 1701 et seq.] shall be construed to require the assignment or transportation of students or teachers in order to overcome racial imbalance.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 251, 88 Stat. 519.)

§ 1752. Provision relating to court appeals

Notwithstanding any other law or provision of law, in the case of any order on the part of any United States district court which requires the transfer or transportation of any student or students from any school attendance area prescribed by competent State or local authority for the purposes of achieving a balance among students with respect to race, sex, religion, or socioeconomic status, the effectiveness of such order shall be postponed until all appeals in connection with such order have been exhausted or, in the event no appeals are taken, until the time for such appeals has expired. This section shall expire at midnight on June 30, 1978.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 253, 88 Stat. 519.)

§ 1753. Provision requiring that rules of evidence be uniform

The rules of evidence required to prove that State or local authorities are practicing racial discrimination in assigning students to public schools shall be uniform throughout the United States.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 254, 88 Stat. 520.)

§ 1754. Application of proviso of section 407(a) of the Civil Rights Act of 1964 [42 USCS § 2000c-6(a)] to the entire United States

The proviso of section 407(a) of the Civil Rights Act of 1964 [42 USCS § 2000c-6(a)] providing in substance that no court or official of the United States shall be empowered to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards shall apply to all public school pupils and to every public school system, public school and public school board, as defined by title IV [42 USCS §§ 2000c et seq.], under all circumstances and conditions and at all time in every State, district, territory, Commonwealth, or possession of the United States, regardless of whether the residence of such public school pupils or the principal offices of such public school system, public school or public school board is situated in the northern, eastern, western, or southern part of the United States.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 255, 88 Stat. 520.)

§ 1755. Additional priority of remedies

Not withstanding any other provision of law, after June 30, 1974 no court of the United States shall order the implementation of any plan to remedy a finding of de jure

segregation which involves the transportation of students, unless the court first finds that all alternative remedies are inadequate.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 256, 88 Stat. 520.)

§ 1756. Remedies with respect to school district lines

In the formulation of remedies under this title [20 USCS §§ 1701 et seq.] the lines drawn by a State subdividing its territory into separate school districts, shall not be ignored or altered except where it is established that the lines were drawn, or maintained or crossed for the purpose, and had the effect of segregating children among public schools on the basis of race, color, sex, or national origin, or where it is established that, as a result of discriminatory actions within the school districts, the lines have had the effect of segregating children among public schools on the basis of race, color, sex, or national origin.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 257, 88 Stat. 520.)

§ 1757. Prohibition of forced busing during school year

(a) The Congress finds that—

(1) the forced transportation of elementary and secondary school students in the implementation of the constitution requirement for the desegregation of such schools is controversial and difficult under the best planning and administration; and

(2) the forced transportation of elementary and secondary school students after the commencement of an academic school year is educationally unsound and administratively inefficient.

(b) Notwithstanding any other provisions of law, no order of a court, department, or agency of the United States, requiring the transportation of any student incident to the transfer of that student from one elementary or secondary school to another such school in a local educational agency pursuant to a plan requiring such transportation for the

racial desegregation of any school in that agency, shall be effective until the beginning of an academic school year.

(c) For the purpose of this section, the term "academic school year" means, pursuant to regulations promulgated by the Commissioner, the customary beginning of classes for the school year at an elementary or secondary school of a local educational agency for a school year that occurs not more often than once in any twelve-month period.

(d) The provisions of this section apply to any order which was not implemented at the beginning of the 1974-1975 academic year.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 258, 88 Stat. 520.)

§ 1758. Reasonable time for developing voluntary plan for desegregating schools

Notwithstanding any other law or provision of law, no court or officer of the United States shall enter, as a remedy for a denial of equal educational opportunity or a denial of equal protection of the laws, any order for enforcement of a plan of desegregation or modification of a court-approved plan, until such time as the local educational agency to be affected by such order has been provided notice of the details of the violation and given a reasonable opportunity to develop a voluntary remedial plan. Such time shall permit the local educational agency sufficient opportunity for community participation in the development of a remedial plan.

(Aug. 21, 1974, P. L. 93-380, Title II, Part B, § 259, 88 Stat. 521.)

Civil Rights Attorneys' Fees Act of 1976 (42 USC § 1988)

42 USC § 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil

rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 USCS §§ 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(R. S. § 722; Oct. 19, 1976, P. L. 94-559, § 2, 90 Stat. 2641.)

Elementary and Secondary Education Act of 1965 (Section 615, now codified as 20 USC § 3205)

20 USC § 3205. Attorney fees

Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings

were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Apr. 11, 1965, P. L. 89-10, Title VI, § 615, as added Act Nov. 1, 1978, P. L. 95-561, Title VI, § 601(a), 92 Stat. 2266.)